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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883. 4

No. ~~387.~~ 75

PHILADELPHIA BAR ASSOCIATION

SAMUEL HEAD, PLAINTIFF IN ERROR,

vs.

THE AMOSKEAG MANUFACTURING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

FILED OCTOBER 12, 1881.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 387.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

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1 UNITED STATES OF AMERICA, *ss :*

[SEAL.] The President of the United States of America to the honorable judges of the supreme court of the State of New Hampshire, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Amoskeag Manufacturing Company, plaintiff, and Samuel Head, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or

2 of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commissiom, a manifest error hath happened to the great damage of the said defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the tenth day of August, in the year of our Lord one thousand eight hundred and eighty-one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by— ——— ———.

3 STATE OF NEW HAMPSHIRE, *Merrimack.* } *ss :*

The Supreme Court.

Pusurant to the precept of the foregoing writ, I herewith send the record and proceedings of the suit, The Amoskeag Manufacturing Company against Samuel Head, with all things concerning the same, to the Supreme Court of the United States within named.

In testimony whereof I have hereunto set my hand and the seal

of the supreme court, this seventeenth day of September, A. D. 1881.

L. S. MORRILL, *Clerk.*

To the Honorable Joseph P. Bradley, one of the Justices of the Supreme Court of the United States.

Samuel Head of Hooksett, in the county of Merrimack and State of New Hampshire, respectfully represents that a term of the supreme court of the State of New Hampshire, at Concord, in said county of Merrimack, commencing on the first Tuesday of April, A. D. 1880, and ending on the 27th day of September, A. D. 1880, a final judgement and decree was rendered by said court against said Head in a certain petition wherein the Amoskeag Manufacturing Company, a corporation by law established at Manchester, in the county of Hillsborough and State of New Hampshire, was plaintiff, and said Samuel Head was defendant, and wherein was drawn in question the validity of chapter twenty of the laws of said State for the year 1868, entitled an act for the encouragement of manufactures, and of chapter one hundred and forty-one of the general laws of said State, in relation to mills and their repairs and flowage, on the ground of their being repugnant to sections one of article fourteen of the amendments to the constitution of the United States, inasmuch as the taking authorized by said statutes was to a mere private use, and the decision was in favor of their validity, and wherein the said Head claimed that his property sought to be taken and appropriated under said petition to the uses of said corporation, the same being private uses, was protected and exempted from such taking or appropriation by the said first section of said article fourteen, and the decision was against such priviledge and immunity so specially set up and claimed, as by the assignment of errors herewith presented will more fully appear.

Therefore the said Head prays for the allowance of a writ of error for the reversal and correction of said judgement and decree and decisions and that a citation may be issued to said corporation to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, to answer to the writ of error issued in said cause.

Dated the first day of August, A. D. 1881.

SAMUEL HEAD,
By his att'y, C. R. MORRISON.

A writ of error as herein prayed is allowed.

JOSEPH P. BRADLEY.

STOWE, VERMONT, *August 4th*, 1881.

Endorsed: Application for a writ of error. No. 1.

The United States of America to the Amoskeag Manufacturing Company, a corporation by law established at Manchester, in the county of Hillsborough and State of New Hampshire, Greeting:

You are hereby cited and admonished to be and appear at the

Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New Hampshire, at Concord, in the county of Merrimack, in said State, wherein Samuel Head, of Hooksett, in said county of Merrimack, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment and decree rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

9 Witness the Honorable Joseph P. Bradley, one of the Justices of the Supreme Court of the United States, this 4th day of August, in the year of our Lord one thousand eight hundred and eighty-one.

JOSEPH P. BRADLEY.

On this 15th day of August, 1881, I gave in hand to Thomas L. Livermore, clerk of the Amoskeag Manufacturing Company, within named, a true copy of the within citation.

WM. LITTLE.

On this 15th day of August, A. D. 188I, personally appeared William Little before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Thomas L. Livermore, clerk of the Amoskeag Manufacturing Company within named.

10 Sworn and *and* subscribed the 15th day of August, A. D. 1881, before me.

JOSEPH B. CLARK, *Notary Public.*

11 Endorsed: Citation. No. 2.

12 UNITED STATES OF AMERICA:

Supreme Court.

SAMUEL HEAD, Plaintiff in Error,

vs.

THE AMOSKEAG MANUFACTURING COMPANY, Def't in Error.

On a judgment of the supreme court of the State of New Hampshire, at a term thereof commencing on the first Tuesday of April, A. D. 1880, and ending on the 27th day of September, A. D. 1880, held at Concord, in the county of Merrimack, in the State of New Hampshire, in a petition wherein the said Amoskeag Manufacturing Company was plaintiff and the said Samuel Head was defendant, and which said judgment was sustained at the law term of said court at the June session, A. D. 1880.

And the said Samuel Head prays for a writ of error to issue, returnable to the Supreme Court of the United States, at the

13 term thereof to be holden at Washington on the second Monday of October, in the year of our Lord one thousand eight

hundred and eighty-one, and assigns for error in the record and judgment aforesaid the following, to wit:

I. Because said supreme court of said State overruled the demurrer of said Head under which said Head assigned as cause of demurrer; that the taking of the property of said Head, prayed for in the petition of the said company, was within the prohibition of the fourteenth amendment to the Constitution of the United States.

II. Because said court denied said Head's motion in arrest of judgment, which was based by him upon the following grounds, by him specified, viz:

1. "Because by the Constitution of the United States, in
14 fourteenth amendment to the same, which provides, among other things that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, the defendant's property is protected and exempted from being taken by the said company for the uses, and in the manner stated in their petition, the taking contemplated by said petition being for private and not for public uses."

2. "Because the statutes of this State, under which said suit was prosecuted, to wit, the act of July 3d, 1868, (laws of 1868, chapt. XX), and Chap. 141 of the general laws of the State of New Hampshire, are in violation of the Constitution of the United States in the fourteenth amendment to the same, which provides, among other things, that no State shall deprive any person of property without due process of law, nor to any person within its jurisdiction the equal protection of the laws, the taking contemplated by
15 said statutes being for private and not for public uses."

3. "Because nothing is stated in said petition showing that the taking of the defendant's property, contemplated by the same, would be to public uses, and by the Constitution of the United States the defendant is exempted from any such taking as said petition contemplates."

4. "Because the taking contemplated by said petition and provided by said statutes is for a private and not for a public use, and not warranted by the constitution of said State, but is and would be depriving the defendant of his property without due process of law, and within the prohibition of the aforesaid fourteenth amendment, and would also be a denial to him of the equal protection of the laws under the 2d clause of the first article of the bill of rights of said State, which declares that all men have certain natural,
16 essential, and inherent rights, among which are the acquiring, possessing, and protecting property, and also under the 10th clause of said article, which declares that every member of the community has a right to be protected in the enjoyment of his property, and is under the prohibitions of said fourteenth amendment, and contrary to the immunity secured by it."

III. Because said court decided that the taking contemplated by said petition and provided for by said statutes would be a taking for public uses within the meaning of the 10th clause of the first article of the bill of rights of said State.

IV. Because said court decided that said statutes are not in violation of the Constitution of the United States, nor of the fourteenth amendment to the same.

V. Because said court decided that the said Head is not
17 exempted by said fourteenth amendment from having his property mentioned in said petition taken by the said company, as contemplated by their said petition.

VI. Because said court ordered and decreed that upon payment or tender of the amount of damages which had been assessed by the jury against the protest of said Head, with fifty per cent. added, said company should be forever discharged from any liability in relation to the premises of the said Head described in said petition, by reason of the using or flowing of the same for the use of the mill or mills in said petition mentioned after the 24th day of July, 1878.

VII. Because said court overruled the bill of exceptions of said Head to the denials and rulings and decree aforesaid, the same being a final decree.

18 VIII. Because said court against the written protest of said Head directed the jury to assess damages, and to return and sign the verdict appearing in the record of said cause.

IX. Because said court should have ordered and decreed that the petition aforesaid be dismissed.

X. Because in said suit, at the March adjourned term, 1876, of the December law term, 1875, of the superior court of judicature, then being the highest court of said State, and to whose powers and duties said supreme court of said State succeeded, said superior court overruled the demurrer of said head to said petition under which was assigned, as cause of demurrer, that the taking prayed for by said petition and provided for by the statutes aforesaid, the same being for private and not to a public use, is within the prohibitions of the fourteenth amendment to the Constitution of the United States.

19 XI. Because said supreme court of said State in said cause, at the April term thereof, 1879, overruled the objection of said Head, that there was no evidence introduced or offered to prove that the taking of the property of the said Head would be a taking for the public use, and the same would be in violation of the constitution of said State, and of the first section of Art. XIV of the amendments of the Constitution of the United States, which provide that no State shall deprive any person of property without due process of law, nor to deny to any person within its jurisdiction the equal protection of the laws, and which said decision of said court was affirmed and sustained by said court at the law term thereof, holden by adjournment at said Concord, in March, 1880.

By his att'y, C. R. MORRISON.

20 Know all men by these presents, that we, Samuel Head, of Hooksett, in the county of Merrimack and State of New Hampshire, and George A. Robie and Benjamin A. Ham, both of said Hooksett, are held and firmly bound unto the Amoskeag

Manufacturing Company, a corporation by law established at Manchester, in the State of New Hampshire, in the full and just sum of five hundred dollars, to be paid to the said corporation, its certain attorney, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this first day of August, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas lately at a term of the supreme court for the State of New Hampshire, held at Concord, in said county of Merrimack, commencing on the first Tuesday of April, A. D. 1880, and ending on the 27th day of September, 1880, in a suit depending in said court, between said corporation and the said Samuel Head, a final judgment and decree was rendered against the said Head, and the said Head having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the said judgment & decree in the aforesaid suit, and a citation directed to the said corporation, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next.

Now, the condition of the above obligation is such, that if the said Head shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

SAMUEL HEAD. [SEAL.]
GEORGE A. ROBIE. [SEAL.]
BENJAMIN A. HAM. [SEAL.]

Sealed and delivered in presence of—
CHARLES A. TENNEY.
ARTHUR G. ROBIE.

Approved by—
JOSEPH P. BRADLEY,
Associate Justice, Supreme [Court] U. States.
August 4th, 1881.

A true copy of bond.
Attest:
C. R. MORRISON,
Att'y of Samuel Head.

21 Endorsed: Copy of appeal bond.

22 THE STATE OF NEW HAMPSHIRE, *Merrimack*, } ss:

I, L. S. Morrill, clerk of the supreme court for the county of Merrimack aforesaid, having by law the custody of the records and files of the late superior court of judicature and the circuit court, hereby certify that the annexed papers, numbered from one to fourteen, inclusive, are true copies or transcripts of the judgment, record, docket entry, and all papers on file not set forth at length in the judgment record in the action The Amoskeag Manufacturing

Company *against* Samuel Head, the same being a true and exact exemplification of the proceedings had in said action.

In testimony whereof, I have hereunto set my hand and the seal of said court, this seventeenth day of February, A. D. 1881.

[SEAL.] L. S. MORRILL, *Clerk.*

23 No. 1.

STATE OF NEW HAMPSHIRE, *Merrimack*, } *ss:*

At the trial term of the supreme court, holden at Concord, within and for the county of Merrimack aforesaid, on the first Tuesday of April, in the year of our Lord one thousand eight hundred and eighty.

Present: Hon. William L. Foster, presiding justice; Hon. George A. Bingham, presiding justice in No. 1 equity.

HEAD *v.* AMOSKEAG CO. } No. 1.

To the circuit court for the county of Merrimack:

The Amoskeag Manufacturing Company complains against Samuel Head, of Hooksett, in the county of Merrimack, and State of New Hampshire, and respectfully represents that said company was duly incorporated by the laws of the State of New Hampshire by an act passed July 1, 1831, and that in and by the charter of incorporation so granted it was empowered to establish, manage,

24 and carry on the manufacture of cotton, woolen, iron, and other lawful manufactures on and near the Amoskeag falls in Goffstown, and also any and all such branches of manufacture and trade as is necessary to carry on and manage the business of said corporation, and to purchase, take, hold, and convey real and personal estate of every kind to such amount as they may find necessary and convenient in the management of their concerns: *Provided*, the same shall not exceed the sum of one million dollars; and the same to manage, improve, change, and sell at their pleasure, and to erect on the real estate to be purchased and held by them as aforesaid, such dams, canals, mills, buildings, machines, and works as they may deem necessary or useful in carrying on and managing their manufactures and works, and in conducting the business of the corporation.

That by amendment to said charter, passed June 26, 1838,

25 said corporation were authorized to purchase, hold, dispose of, use, and inprove any part, or the whole of the stock of the Amoskeag Canal Company, or any other canal company, at or near Amoskeag Falls, on Merrimack river, with all the rights and privileges, and subject to all the liabilities and obligations appertaining to said companies, under their respective charters. That when the Amoskeag Manufacturing Company owned the whole of the stock of any of the above-named companies, that the duties of the same may be performed, and the privileges enjoyed in the

name of the Amoskeag Manufacturing Company, and the capital stock allowed for carry on its business at the Amoskeag Falls, in Manchester, was subsequently increased to the amount of three millions of dollars.

That the Amoskeag Canal Company was by its charter authorized to construct a dam across the Merrimack river at Amoskeag Falls, and that the whole of the stock of the Amoskeag
26 Canal Company is held by the Amoskeag Manufacturing Company, who thereby are entitled to all the powers, rights, and privileges of the Amoskeag Canal Company.

That the Amoskeag Cotton and Woolen Manufacturing Company was by its charter authorized to construct any mills, and erect any dam across Merrimack river at Amoskeag Falls that they might find useful for carrying on the manufacture of cotton and woolen fabrics, and that the rights, powers, and privileges of the Amoskeag Cotton and Woolen Manufacturing Company are now held by the Amoskeag Manufacturing Company.

That said Amoskeag Manufacturing Company, under the authority so granted, have purchased the land on both sides of Merrimack river at Amoskeag Falls, and including the river and falls, and have there erected mills, dug canals, and established works at a cost of several millions of dollars, and have encouraged others to also erect mills and works, at an expenditure of several millions of dollars more, and intend erecting other works and mills at a
27 large expense, and for the purpose of rendering the water power of said river at said falls available for the use of such mills and works have there constructed a dam across said river, and placed flash-boards thereon as part of said dam.

That the construction of said mills and dam, and placing flash-boards thereon to raise the water for working said mills and works, and for creating a reservoir of water, and for equalizing the floor of the same for the use of such mills, is of public use and benefit to the people of this State, and that the same is necessary for the use of the mills for which it is designed.

That Samuel Head, of Hookselt, in the county of Merrimack, aforesaid, claims to be seized and possessed of a tract of land in Hookselt, in said county of Merrimack, bounded northerly by Merrimack river, easterly by land formerly of Joseph T. Goss, southerly by the highway, and westerly by land of the Concord rail-
28 road, and that by said dam so erected, with such flash-boards thereon, said land is overflowed, and the ground, grass, and soil of said premises washed away, to the damage of said Head, as he says, to the amount of five hundred dollars.

(And said Amoskeag Manufacturing Company are also informed that said premises are claimed by ——, of ——, in said county of ——, who also claims that the same is in like manner overflowed, and the ground, grass, and soil of said premises washed away, as —— claims to —— damage, the sum of —— dollars. And said company are also informed that ——, of ——, in ——, claims an interest in said premises by mortgage or otherwise.) And said Amoskeag Manufacturing Company say that said land is not overflowed by

said dam and flash-boards so erected, nor is the ground
29 grass, and soil thereof thereby washed away, nor thereby are the said premises in any way injured; that they were notified of said pretended damage or injury on or about the first day of March, 1875, and that they have been hitherto unable satisfactorily to adjust the same. Wherefore said Amoskeag Manufacturing Company pray that a view of said premises may be held, and the parties heard, that it may be determined by said court whether the construction of such mills and canals, and the erection of said dam, with said flash-boards forming part of the same, as constructed by said corporation, and the flowing (if any) of said land thereby to the depth and extent that the same may or can be flowed, or otherwise injured by said dam and flash-boards, is or may be of public use or benefit to the people of this State, and whether the same is necessary for the use of the mills already erected, and that are designed to be erected, and for which it was designed; and that
30 the damages that have been done, or that may be done, to said premises (if any) by the construction of said dam, and the placing flash-boards thereon as part thereof may be assessed in accordance with the provisions of the statute.

AMOSKEAG MANUFACTURING COMPANY,
By its attorney, S. N. BELL.

THE STATE OF NEW HAMPSHIRE, }
Merrimack, } *ss:*

OFFICE OF THE CLERK OF THE CIRCUIT COURT,
Mar. 22, A. D. 1875.

Upon the filing of the foregoing petition it is ordered that the said pl'f notify the said def't of the pendency thereof, and summon him to appear before said court, at a term to be held at Concord, in the county of Merrimac, within and for said county, on the first Tuesday of April next, to show cause, if any he has, why the prayer of said petition should not be granted, by causing a certified
31 copy of said petition, and of this order thereon, to be given to or left at the last and usual place of abode of the said Head fourteen days at least before said term of said court, and make return thereof.

Attest: L. S. MORRILL, *Clerk.*

Said action was entered at the April term, 1875, of the circuit court; the parties appeared, and def't filed his demurrer as follows:

Defendant's Demurrer.

MERRIMACK, *ss:*

Circuit Court. April Term, 1875.

AMOSKEAG MANUFACTURING COMPANY *vs.* SAMUEL HEAD.

The defendant says that the said declaration is not sufficient in law, and assigns the following cause of demurrer:

1. The statute by which the plaintiff proposes to take the defend-

ant's land and have the damage assessed is unconstitutional and void.

SAMUEL HEAD.
32 By his att'ys, W. & G. A. LITTLE.

Said demurrer was thereupon overruled, and upon consideration of certain questions of law arising in the case, the same were transferred for the consideration of the superior court of judicature, holden on the first Tuesday of June, A. D. 1875, when said action was continued from term to term to the April term, 1876. At said term the parties again appeared, and the superior court of judicature having at its term, holden on the first Tuesday of December, A. D. 1875, duly considered said questions of law, and ordered that the demurrer be overruled, and that def't have leave to file bill of exceptions in twenty days, the same has been duly certified to the court sitting here.

Thereupon defendant filed his protest as follows:

Circuit Court. April Term, 1876.

MERRIMACK, *ss:*

AMOSKEAG M'F'G COMPANY *vs.* SAMUEL HEAD

The said Head objects that, if said petition is to be tried at
33 all, it should not be by a committee to be appointed by the court, but by the jury of the county; but he also objects and protests that the contemplated appropriation of the defendant's property is not to a public use, and that the taking of it would be depriving him of his property without due process of law, in violation of the XIV Amendment of the Constitution of the United States, and he respectfully insists that the act under which said petition was filed, being chapter 20, of the Laws of 1868, so far as it attempts to authorize the taking of the defendant's property in the manner and for the uses contemplated by the petition, is contrary to the aforesaid amendment, and is null and void.

By his att'ys, W. & G. A. LITTLE,
C. R. MORRISON.

The court appointed Joseph F. Wiggin, Sam'l C. Wiggin, and Benj. A. Kimball commissioners, and said action was continued to the October term, 1876, of the supreme court, the circuit court having been abolished by law, and the business thereof trans-
34 ferred to said supreme court; at which term the parties again appeared, and the said commission was discharged.

Said action was then continued from term to term to the April term, 1879.

At said term the parties again appeared, and leave was granted to amend petition.

On the fourteenth day of said April defendant filed the following plea.

MERRIMACK, *ss:*

Supreme Court. April Term, 1879.

THE AMOSKEAG MANUFACTURING COMPANY
vs.
SAMUEL HEAD.

The said Samuel Head, protesting that the said statutes or acts of the Legislature under which the said company claim an assessment of damages, upon the payment of which, or tender thereof, they shall obtain a right to flow his land and appropriate his property to their use, is in violation of Sec. 1 of Art. XIV of the amendments to the Constitution of the United States, which provides that no State shall deprive any person of property without due pro-
35 cess of law, nor deny any person within its jurisdiction the equal protection of the laws, inasmuch as the use to which the said Head's property is thus to be appropriated is a private use and not a public use, and protesting that it is not competent for the jury to pass upon the question, which the construction of the mills and canals of said company, and the erection of their said dam, with said flash-boards forming a part of the same, as constructed by said corporation, and the flowing of his land thereby to the depth and extent that the same may or can be flowed, or otherwise injured by said dam and flash-boards, is or may be of public use or benefit to the people of the State, or that the same is necessary for the use of the mills for which it is designed, nevertheless expressly admits that if it is competent for the jury to pass upon said questions,
36 upon any evidence that can lawfully be submitted to them, against his protest, said evidence is to be deemed to have been already submitted against his protest, and the jury to have found in accordance with all the allegations of the petition, in all matters relating to the same, except as to the fact of flowage and injury and the amount of damages.

This land described in said petition, and other land of his adjoining the same, on the south side of the highway mentioned in said petition, are and will be greatly damaged, flowed, and injured by said dam and flash-boards, and all to the damage of the said Head, as he says, the sum of fifteen thousand dollars.

SAMUEL HEAD.
By his att'ys, C. R. MORRISON &
W. & G. A. LITTLE.

Motion was made by plaintiff to reject the plea. Said action thereupon came on for trial, and as well the parties by
37 their counsel, as their witnesses and evidences being fully heard, the cause was committed to a jury sworn according to law to try said issue, who returned an informal verdict (which see on file), and the verdict was subsequently put in form under the direction of the court, as follows:

THE STATE OF NEW HAMPSHIRE, } ss:
Merrimack, }

Supreme Court. April Term, 1879.

AMOSKEAG MANUFACTURING COMPANY, Petitioners,
vs.
SAMUEL HEAD, Petitionee.

The jury assess the damages of said Head arising under the facts, and claims, as alleged and set forth in the petition in said case, in the sum of three hundred fifty-eight dollars and thirty-three and one-third cents.

SAMUEL P. HASKINS, *Foreman.*

The defendant thereupon filed the following paper:

MERRIMACK, *ss:*

Supreme Court. April Term, 1879.

AMOSKEAG M'F'G CO. *vs.* SAMUEL HEAD.

38 The jury having returned a verdict assessing the damages, the said Head objects and excepts to the ordering of the special verdict in addition thereto, because there was no evidence introduced or offered to prove that the taking of the property would be a taking for the public use, and because the same would be in violation of the constitution of this State, and of section first of Art. XIV of the amendments of the Constitution of the United States, which provides that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

SAMUEL HEAD.
By his att'ys, C. R. MORRISON,
W. & G. A. LITTLE.

And upon consideration of questions of law arising in the case the same were reserved for the consideration of the full court, at its next law term for said county, holden on the first Tuesday of June, 1879, and said action was continued from term to term to the
39 present term. Now at this term the parties again appear, and the full court having at the law term holden by adjournment in March, 1880, duly considered said questions of law, and ordered that there be judgment on the verdict, said order has been duly certified to the court sitting here.

On the eighth day of June, 1880, to which time this action was postponed, before Hon. George A. Bingham, presiding justice, the parties appeared, defendant filed his motion in arrest of judgment, (which see on file,) the court denied the motion, and defendant excepted.

The court thereupon ordered judgment upon the verdict, and issued a decree, as follows:

MERRIMACK, *ss:*

Supreme Court. April Term, 1880.

AMOSKEAG MANUFACTURING COMPANY *vs.* SAMUEL HEALD.

40 This petition came on for final hearing at the April term of court, 1880, and it is now ordered, adjudged, and decreed that the facts set forth in said petition are true; that the construction of such mills and canals, and the erection of said dam with said flash-boards forming part of the same, as constructed by said corporation, and the flowing of said land thereby, to the depth and extent that the same may or can be flowed, or otherwise injured by said dam and flash-boards, is or may be of public use or benefit to the people of this State, and the same is necessary for the use of the mills already erected, and that are designed to be erected, and for which it was designed, and that the damages that have been done or that may be done to said premises of the defendant, set forth in said petition from and after July 24th, A. D. 1878, forever, by the con-
41 struction of said dam, and the placing flash-boards thereon as part thereof, are, as assessed by the jury, at three hundred fifty-eight dollars and thirty-three and one-third cents, with interest from the date of the verdict, amounting to twenty-three $\frac{29}{100}$ dollars, making the sum of three hundred eighty-one dollars and sixty-two cents, and that said defendant recover as aforesaid of the said plaintiff the said sum of three hundred eighty-one and $\frac{62}{100}$ dollars as damages, and fifty per cent. thereof in addition thereto, making in all the sum of five hundred seventy-two and $\frac{43}{100}$ dollars, and that upon the tender or payment to said defendant of said sum of five hundred seventy-two dollars and forty-three cents; that said plaintiff shall have the right to erect and maintain said dam with said flash-boards forming part of the same, as constructed by
42 said corporation, as set out in said petition, and to flow thereby forever the said land of the defendant, to the depth and extent that the same may or can be flowed, or otherwise injured, by said dam and flash-boards, and said plaintiff shall be forever discharged from any liability in relation to the premises of the defendant, described in said petition, by reason of using or flowing the same from and after July 24th, 1878, and forever thereafter, as set out in said petition, for the use of the mill or mills in said petition mentioned.

It is also decreed that the said Head recover costs, taxed at one hundred forty-six dollars and thirty-five cents.

L. S. MORRILL, *Clerk.*

Subsequently defendant filed his bill of exceptions (as set forth at large on file.) Said bill of exceptions was allowed by
43 the court and entered at the June T., 1880, and at said June term, held by adjournment on September second, 1880, the full court having duly considered said questions of law, ordered that the exceptions be overruled, which order has been duly certified to the trial term.

At the December term, 1880, of said court, defendant presented a motion in writing to the court, (which motion see on file,) and the court order that the motion be granted.

Dec. 22, 1880.

Attest: L. S. MORRILL, *Clerk.*

44 No. 2.

STATE OF NEW HAMPSHIRE, *Merrimack*, } *ss.:*

At the trial term of the supreme court, holden at Concord, within and for said county of Merrimack, on the first Tuesday of April, in the year of our Lord one thousand eight hundred and eighty.

Present: Hon. William L. Foster, presiding justice; Hon. George A. Bingham, presiding justice in No. 1, equity.

Attest: L. S. MORRILL, *Clerk.*

April Term, 1875.

AMOSKEAG CO. *vs.* SAMUEL HEAD. } 1.

Mugridge, Bell, Clark.

Little, P. & N., Morrison.

Mar. 22, '75, petition and order.

Apr., '75, demurrer overruled and case transferred.

S. Ct. of J., Dec., '75, demurrer overruled.

Def't has leave to file bill of exceptions in 20 d.

45 Apr. '76, protest filed. Joseph F. Wiggin, Daniel C. Wiggin, and Benjamin A. Kimball, commissioners.

Oct., '76, commission discharged.

(Stanley, J., does not sit.)

Oct., '77, pl'ff to pet. and tn. and $8.

Apr., '79, leave to amend petition by ag't.

Apr. 16, mo. by pl'ff to reject plea. Tried.

Verdict for def't for $358.33⅓ qr.

Mar. adj. T., '80, ordered that there be judgment on the verdict.

Mo. in arrest of judgment, June 1, '80.

Pl'ff objects; mo. denied; (def't excepts.)

Decree. June adj. T., '80, ordered that the exceptions be overruled. Dec. T., 1880, motion by def't to amend record. Granted Dec. 22, 1880.

The court met on the sixth day of April, A. D. 1880, and continued in session to the 22d day of April, when it adjourned to the third day of May, 1880. On the third day of May, aforesaid,

46 court again met and remained in session until the fifteenth day of said May, and again adjourned to the eighth day of June, (to consider questions arising in No. 1 equity, Amoskeag Company against Samuel Head.) At said time the court, (Hon. George A. Bingham, presiding justice, appeared), and on the same

day the court adjourned to the 27th day of September, 1880, and on said 27th day of September adjourned without delay.

47 No. 3.

MERRIMACK, *ss:*

Circuit Court.—April Term, 1875.

AMOSKEAG MANUFACTURING COMPANY *v.* SAMUEL HEAD.

The plaintiffs filed the following petition:

To the circuit court for the county of Merrimack:

The Amoskeag Manufacturing Company complains against Samuel Head, of Hooksett, in the county of Merrimack and State of New Hampshire, and respectfully represents that said company was duly incorporated by the laws of the State of New Hampshire, by an act passed July 1, 1831, and that in and by the charter of incorporation so granted, it was empowered to establish, manage, and carry on the manufacture of cotton, woolen, iron, and other lawful manufactures, on and near the Amoskeag Falls, in Goffstown, and also any and all such branches of manufacture and trade as is necessary to carry on and manage the business of said corporation, and to purchase, take, hold, and convey real and personal estate of every kind to such amount as they may find necessary and convenient in the management of their concerns: *Provided*, the same shall not exceed the sum of one million dollars. And the same to manage, improve, change, and sell at their pleasure. And to erect on the real estate to be purchased and held by them, as aforesaid, such dams, canals, mills, buildings, machines, and works as they may deem necessary or useful in carrying on and managing their manufactures and works, and in conducting the business of the corporation.

That by an amendment to said charter, passed June 26, 1838, said corporation were authorized to purchase, hold, dispose of, use, and improve any part or the whole of the stock of the Amoskeag Canal Company, or any other canal company at or near Amoskeag Falls, on Merrimack river, with all the rights and privileges, and subject to all the liabilities and obligations appertaining to said companies under their respective charters.

That when the Amoskeag Manufacturing Company own the whole of the stock of any of the above-named companies, that the duties of the same may be performed, and the privileges enjoyed in the name of the Amoskeag Manufacturing Company, and the capital stock allowed for carrying on its business at the Amoskeag Falls, in Manchester, was subsequently increased to the amount of three millions of dollars.

That the Amoskeag Canal Company was by its charter authorized to construct a dam across the Merrimack river, at Amoskeag Falls, and that the whole of the stock of the Amoskeag Canal Company is held by the Amoskeag Manufacturing Company, who thereby

are entitled to all the powers, rights, and privileges of the Amoskeag Canal Company.

That the Amoskeag Cotton and Woolen Manufacturing Company was, by its charter, authorized to construct any mills, and erect any dam across Merrimack river, at Amoskeag Falls, that they might find useful for carrying on the manufacture of cotton and woolen fabrics, and that the rights, powers, and privileges of the Amoskeag Cotton and Woolen Manufacturing Company are now held by the Amoskeag Manufacturing Company.

48 That said Amoskeag Manufacturing Company, under the authority so granted, have purchased the land on both sides of Merrimack river, at Amoskeag Falls, and including the river and falls, and have there erected mills, dug canals, and established works at a cost of several millions of dollars, and have encouraged others to also erect mills and works at an expenditure of several millions of dollars more, and intend erecting other works and mills at a large expense, and for the purpose of rendering the water power of said river at said falls available for the use of such mills and works, have there constructed a dam across said river, and placed flash-boards thereon as part of said dam. That the construction of said mills and dam, and placing flash-boards thereon to raise the water for working said mills and works and for creating a reservoir of water, and for equalizing the flow of the same for the use of such mills, is of public use and benefit to the people of this State, and that the same is necessary for the use of the mills for which it is designed.

That Samuel Head, of Hooksett, in the county of Merrimack aforesaid, claims to be seized and possessed of a tract of land in Hooksett, in said county of Merrimack, bounded northerly by Merrimack river, easterly by land formerly of Joseph T. Goss, southerly by the highway, and westerly by land of the Concord railroad; and that by the said dam so erected with such flash-boards thereon, said land is overflowed, and the ground, grass, and soil of said premises washed away to the damage of said Head, as he says, to the amount of five hundred dollars.

And said Amoskeag Manufacturing Company say that said land is not overflowed by said dam and flash-boards so erected, nor is the ground, grass, and soil thereof thereby washed away, nor thereby are the said premises in any way injured; that they were notified of said pretended damagd or injury on or about the first day of March, 1875, and that they have been hitherto unable satisfactorily to adjust the same.

Wherefore said Amoskeag Manufacturing Company pray that a view of said premises may be held and the parties heard, that it may be determined by said court whether the construction of such mills and canals, and the erection of said dam, with said flash-boards forming part of the same as constructed by said corporation, and the flowing, if any, of said land thereby to the depth and extent that the same may or can be flowed, or otherwise injured by said dam and flash-boards, is or may be of public use or benefit to the people of this State, and whether the same is necessary for the use

of the mills already erected, and that are designed to be erected, and for which it was designed; and that the damages that have been done, or that may be done to said premises, if any, by the construction of said dam, and the placing flash-boards thereon as part thereof, may be assessed in accordance with the provisions of the state.

AMOSKEAG MANUFACTURING COMPANY,
By its Attorney, S. N. BELL.

The defendant filed the following demurrer.

49 *Defendant's Demurrer.*

MERRIMACK, *ss*:

Circuit Court. April Term, 1875.

AMOSKEAG MANUFACTURING COMPANY *v.* SAMUEL HEAD.

The defendant says that the said declaration is not sufficient in law, and assigns the following cause of demurrer:

I. The statute by which the plaintiff proposes to take the defendant's land and have the damages assessed, is unconstitutional and void.

SAMUEL HEAD.
By his attorneys, W. & G. A. LITTLE.

The court overruled the demurrer and the defendant excepted.

Ordered. That the questions of law thus raised be transferred to the superior court.

WM. L. FOSTER, *Presiding Justice.*

50 Endorsed: Case. Amoskeag Manufacturing Co. *v.* Samuel Head. S. N. Bell, J. Y. Mugridge, att'ys for plaintiff. Wm. Little, C. R. Morrison, Page & Norris, att'y for defendant. Merrimac, *ss.* Copies distributed to court and counsel, May 3, 1875, by Luther S. Morrill, clerk.

51 No. 4.

STATE OF NEW HAMPSHIRE, *Merrimack*, } *ss*:

At the superior court of judicature for the State of New Hampshire, holden at Concord, in said county of Merrimack, on the first Tuesday of December, anno Domini 1875, and by adjournment in March, 1876.

Present: Hon. E. L. Cushing, chief justice; Hon. W. S. Ladd, Hon. I. W. Smith, justices.

Amoskeag Man'f'g Co. *v.* Samuel Head.

In the foregoing action it is ordered that the demurrer be overruled, and that defendant have leave to file a bill of exceptions in 20 days.

Attest: L. S. MORRILL, *Clerk.*

52 Endorsed: Equity. No. 23. Order of court. Amoskeag Manufacturing Co. *v.* Samuel Head. Merrimack county. December term, 1875.

53 No. 5.

The jury on the case of Amoskeag Corporation *against* Samuel Head agree to a verdict of damages of three hundred fifty-eight and 33⅓-100 dollars.

SAMUEL P. HASKINS, *Foreman.*

54 No. 6.

THE STATE OF NEW HAMPSHIRE, *Merrimack*, } *ss*:

Supreme Court. April Term, 1879.

AMOSKEAG MANUFACURING COMPANY, Petitioners,
v.
SAMUEL HEAD, Petitionee.

The jury assess the damages of said Head arising under the facts claimed as alleged and set forth in the petition in said case, in the sum of three hundred fifty-eight dollars and thirty-three and one-third cents.

SAMUEL P. HASKINS, *Foreman.*

55 No. 7.

MERRIMACK, *ss.*

Supreme Court. April Term, 1879.

AMOSKEAG MANUFACTURING CO. *v.* SAMUEL HEAD.

Petition for the assessment of damages under 620, L. of 1868. Case reported, 56 N. H., 386. The defendant filed the following admission:

The said Samuel Head protesting that the statutes or acts of the Legislature under which the said company claim an assessment of damages upon the payment of which or under thereof, they shall obtain a right to flow his land and appropriate his property to their use, is in violation of Sec. 1 of Art. XIV of the amendments to the Constitution of the United States, which provides that no State shall deprive any person of property without due process of law, nor to deny to any person within its jurisdiction the equal protection of the laws, inasmuch as the use to which the said Head's property is thus to be appropriated, is a private use and not a public use, and protesting that it is not competent for the jury to pass upon the question whether the construction of the mills and canals of said company, and the erection of their said dam with said flash boards, forming a part of the same as constructed by said corporation, and the flowing of his land thereby, to the depth and extent that the same may or can be flowed or otherwise injured by said

dam and flash boards, is or may be of public use or benefit to the people of this State, or that the same is necessary for the use of the mills for which it is designed, nevertheless expressly admits that if it is competent for the jury to pass upon said questions upon any evidence that can lawfully be submitted to them against his protest, said evidence is to be deemed to have been already submitted against his protest, and the jury to have found in accordance with all the allegations of the petition in all matters relating to the same, except as to the fact of flowage, and injury and the amount of damages. His land described in said petition, and other land of his, adjoining the same on the south side of the highway men-
56 tioned in said petition, are and will be greatly damaged, flowed, and injured by said dam and flash boards, and all to the damage of the said Head as he says the sum of fifteen thousand dollars.

SAMUEL HEAD,
By his att'ys, C. R. MORRISON &
W. & G. A. LITTLE.

The defendant moved for the opening and close, denied subject to exception. The plaintiff gave evidence subject to the plaintiff's exception of its character, the erection of its works, their extent, the number of persons employed, and generally of the facts stated in the petition. The court having intimated, the finding, that the raising of the dam was of public use, within the meaning of the statute. The defendant and plaintiff gave evidence as to the damage done the defendant thereby. Then the defendant again moved for the close; also that the petition be dismissed because the evidence showed only a private use. Both motions denied, subject to exception.

The defendant conveyed to the plaintiff, in 1861, the right to flow his land as high as it would be flowed by the erection of the plaintiff's new stone dam, which was finished in September, 1871.

In 1875, the plaintiff placed on the new dam flash boards two feet in height, and it is for the damage done thereby that this proceeding is instituted.

The counsel for the defendant put in evidence the deposition of E. A. Straw, taken May 22, 1878, who was general agent of the company from 1852, and had been before that in their service as civil engineer from 1837. In the said deposition were the following questions and answers:

Int. 5. "Please state whether flash boards were put upon this last dam by the company and maintained there, and if so, what height?"

Ans. I think the company purchased the right of several owners; can't say how many, to maintain flash boards to a certain height on top of this last dam, about two feet; can't say whether there are any inches or not. We have maintained them on the dam since the purchase of this right."

Int. 6. "In the Manchester Daily Union of Feb. 2, 1875, are lists of persons of whom such purchase was made, and of the sums paid, which are as follows:

57 1. J. E. Stearns, sum paid $6,900 00
2. J. M. Webber, " 112 00
3. Mrs. S. S. Webber, " 337 50
4. F. C. Stearns, " 225 00
5. D. Fogg, " 112 50
6. Harris J. Porr, " 2,100 00
7. Enoch N. Ely, " 3,791 00
8. James P. Ely, " 3,900 00
9. John Harvey, " 2,400 00
10. Stephen C. Eastman, " 337 50
11. Harrison Mitchell, " 300 00
12. David A. Kimball, " 1,125 00
13. Wm. R. Eastman, " 630 00
14. Abraham Mitchell, " 738 75
15. Geo. W. Davis, " 300 00
16. Wm. H. Putnam, " 682 00
17. Nancy Shirley, " 510 00
18. John Shirley, " 5,287 50
19. Betsey Goodrich, " 150 00
20. Nathaniel Mitchell, " 2,058 75
21. Peter Kimball, " 1,064 50
22. John Prince, " 528 50
23. Nehemiah Preston, " 975 00
24. Heirs of J. E. Kimball, " 702 50
25. John G. Garland, " 360 00
26. Sarah P. Martin, " 700 00
27. Alpheus A. Wells, " 150 00
28. Alfred T. Martin, " 1,045 00
29. J. Thompson, " 5,871 75
30. Sylvester B. Chandler, " 262 50
31. Joseph T. Goss, " 1,336 50
32. J. W. Prescott, " 1,137 50

Please state whether the foregoing sums were paid by the company to the persons named for such purchase?"

58 Ans. The persons and sums named are substantially correct. Each case was settled by a separate board of reference agreed upon by the parties, and each case examined and the parties heard upon it as they desired to be, and, so far as I know, decided and settled upon the report they made, and upon payment of the sums named, conveyances were made by deed to the Amoskeag Mfg. Co."

Subject to the defendant's exception, the last question and answer were excluded.

In 1856 one Daniel Foinier conveyed to the plaintiff the right to maintain the water to the height of the new stone dam. He died, and his daughter Elizabeth inherited a part of the land. The defendant offered in evidence a deed conveying the right to flow the inherited land, as the water was raised by the flash-boards, and a relinquishment of certain claims for unliquidated damages for the consideration of $4,800, which the court excluded subject to the defendant's exception. The deed may be used in argument.

The court, subject to the defendant's exception, allowed Jesse Gault, a witness for the plaintiff, to state what he recently paid for a piece of land, bounded by the river, located near the defendant's, without producing his deed.

Reserved.

GEORGE A. BINGHAM,
Presiding Justice.

59 Endorsed: Merrimack case. Amoskeag Co. *v.* Head. George, Mugridge, Cross. Morrison, Little. Copies dis. June 3, 1879.

No. 8.

60 MERRICK, *ss:*

Supreme Court. April Term, 1879.

AMOSKEAG MANUFACTURING CO. *v.* SAMUEL HEAD.

Amendment.—The only question, formally submitted to the jury, was the one of damages.

The defendant excepted to the form of the verdict, and filed his exception in writing with the clerk. The parties may refer to the verdict and exception in argument.

GEORGE A. BINGHAM,
Presiding Justice.

61 Endorsed: Merrimack, amendment. Amoskeag Co. *v.* Head. George, Mugridge, Cross. Morrison, Little. Copies dis. June 20, 1879.

62 No. 9.

STATE OF NEW HAMPSHIRE, *Merrimack.* } *ss:*

At the supreme court, for the State of New Hampshire, holden at Concord, in said county of Merrimack on the first Tuesday of December, Anno Domini 1879, and by adjournment on the nineteenth day of March, A. D. 1880—

Present: Hon. Charles Doe, chief justice; Hon. William L. Foster, Hon. Clinton W. Stanley, Hon. George A. Bingham, Hon. William H. H. Allen, Hon. Isaac W. Smith, Hon. Lewis W. Clark, justices.

AMOSKEAG M'F'G CO. *v.* SAMUEL HEAD.

In the foregoing action it is ordered that there be judgment on the verdict.

Attest: L. S. MORRILL, *Clerk.*

63 Endorsed: Equity. No. 1. Order of court. Amoskeag M'f'g Co. *v.* Samuel Head. Merrimack county. April Term, 1880.

64 No. 10.

MERRIMACK, *ss:*

Supreme Court. April Term, 1880.

AMOSKEAG M'F'G CO. *v.* SAMUEL HEAD.

The costs in the above action, as agreed upon, were $146.35.

DAVID CROSS,
Att'y for Pl'ff.

65 No. 11.

MERRIMACK, *ss:*

Supreme Court. April Term, 1880.

AMOSKEAG MANUFACTURING COMPANY *v.* SAMUEL HEAD.

The defendant moves that judgment in said suit be arrested, for the following reasons:

I. Because by the Constitution of the United States, in the Fourteenth Amendment to the same, which provides, among other things, that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, the defendant's property is protected and exempted from being taken by said company for the uses and in the manner stated in their petition, the taking contemplated by said petition being for private and not for public uses.

66 II. Because the statutes of this State under which said suit was prosecuted, to wit, the act of July 3, 1868, (Laws of 1868, chapt. XX) and chapt. 141 of the General Laws of the State of New Hampshire, are in violation of the Constitution of the United States, in the Fourteenth Amendment to the same, which provides, among other things, that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, the taking contemplated by said statutes being for private and not for public uses.

III. Because nothing is stated in said petition showing that the taking of the defendant's property contemplated by the same, would be to public uses, and by the Constitution of the United States, the defendant is exempted from any such taking, as said petition contemplates.

67 IV. Because the taking contemplated by said petition and provided by said statutes is for a private and not for a puble use, and not warranted by the constitution of said State, but is and would be the depriving of the defendant of his property without due process of law, and within the prohibition of the aforesaid Fourteenth Amendment, and would also be a denial to him of the equal protection of the laws under the second clause of the first article of the bill of rights of said State, which declares that all men have certain natural, essential, and inherent rights, among which are the acquiring, possessing, and protecting property; and also under the tenth clause of said article, which declares that every member of the community

has a right to be protected in the enjoyment of his property, and is under the prohibition of said Fourteenth Amendment, and
68 contrary to the immunity secured by it.

By his att'ys, C. R. MORRISON.
WM. LITTLE.

69 No. 12.

MERRIMACK, *ss:*

Supreme Court. April Term, 1880.

AMOSKEAG M'F'G CO. *v.* SAMUEL HEAD.

At said term the defendant moved that judgment in said suit be arrested, for the following reasons:

I. Because by the Constitution of the United States, in the Fourteenth Amendment to the same, which provides, among other things, that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, the defendant's property is protected and exempted from being taken by the said company for the uses and in the manner stated in their petition, the taking contemplated by said petition being for private and not for public uses.

70 II. Because the statutes of this State under which said suit was prosecuted, to wit, the act of July 3d, 1868, (Laws of 1868, chapt. XX,) and chap. 141 of the General Laws of the State of New Hampshire, are in violation of the Constitution of the United States, in the Fourteenth Amendment to the same, which provides, among other things, that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, the taking contemplated by said statutes being for private and not for public uses.

III. Because nothing is stated in said petition showing that the taking of the defendant's property contemplated by the same would be to public uses, and by the Constitution of the United States
71 the defendant is exempted from any such taking as said petition contemplates.

IV. Because the taking contemplated by said petition and provided by said statutes is for a private and not for a public use, and not warranted by the constitution of said State, but is and would be the depriving of the defendant of his property without due process of law, and within the prohibition of the aforesaid Fourteenth Amendment, and would also be a denial to him of the equal protection of the laws under the 2d clause of the first article of the bill of rights of said State, which declares that all men have certain natural, essential, and inherent rights, among which are the acquiring, possessing, and protecting property, and also under the 10th clause of said article, which declares that every member of the com-
72 munity has a right to be protected in the enjoyment of his property, and is under the prohibition of said Fourteenth Amendment and contrary to the immunity secured by it.

Said court decided that the taking contemplated by said petition

and provided by said statutes would be a taking for public uses within the meaning of the tenth clause of the first article of the bill of rights of said State; that said statutes are not in violation of the Constitution of the United States, or of the Fourteenth Amendment to the same, and that the defendant is not exempted by said Fourteenth Amendment from having his property, mentioned in said petition, taken by the plaintiffs, as contemplated by their said petition; denied said motion and ordered and decreed that upon payment or tender of the amount of damages assessed by the jury, with fifty per cent. added, said corporation should be forever dis-
73 charged from any liability in relation to the premises of the defendant described in said petition, which is made a part of this case by reason of the using or flowing the same for the use of the mill or mills in said petition mentioned after the 24th day of July, 1878, as will appear more at length by the decree on file, and which is made a part of this bill of exceptions.

To which rulings, denial, and order the defendant excepts, and files this bill of exceptions, which is allowed by the court.

GEORGE A. BINGHAM,
Presiding Justice.

74 No. 13.

STATE OF NEW HAMPSHIRE, *Merrimack*, } *ss:*

At the supreme court for the State of New Hampshire, holden at Concord, in said county of Merrimack, on the first Tuesday of June, anno Domini 1880, and by adjournment on September 2d, A. D. 1880—

Present: Hon. Charles Doe, chief justice; Hon. William L. Foster, Hon. Clinton W. Stanley, Hon. George A. Bingham, Hon. William H. H. Allen, Hon. Isaac W. Smith, Hon. Lewis W. Clark, justices.

AMOSKEAG M'F'G CO. *v.* SAMUEL HEAD.

In the foregoing action it is ordered that the exceptions be overruled.

Attest: L. S. MORRILL, *Clerk.*

75 Endorsed: Equity, No. 1. Order of court. Amoskeag M'f'g Co. *v.* Samuel Head. Merrimack county, June term, 1880.

76 No. 14.

AMOSKEAG M'F'G CO. *v.* SAMUEL HEAD.

The counsel for Samuel Head move that the clerk be instructed to enter upon the record the fact, that at the argument of the transferred case, at the December law term, 1875, the counsel for said Head took the position stated on pages 387, 388, in the reported case, 56 N. H., and cited authorities in support of the same as there stated:

I. The public have no other or different rights in respect to the property or business of the plaintiffs than in respect to the property and business of any and every person and corporation in the State.

II. If the Legislature can authorize the taking of the defendant's property by the plaintiffs without his consent, it can author-
77 ize the taking of his property by any corporation or person, whether engaged in manufacturing, trading, farming, or mechanical business, for every useful business is conducive to the public welfare.

III. And it can authorize towns and cities to loan their credit, and impose taxes in aid, not only of the plaintiffs' business, but of any laudable private and mere private enterprise, for it can impose taxes for any object for which it can take private property.

IV. And it can also take the plaintiffs' mills and water-power, not only for the use of some other corporation engaged in like business, but even for the benefit of any lawful scheme for money-making by which the public would be more or less benefited.

V. On the contrary, we say that a taking for "public uses"
78 within the meaning of our construction is only where there is a taking for the use of the public in some form, and that use not permissive, but of right, and by compulsion if need be.

VI. It follows that a taking of the defendant's property without his consent, as prayed for in the plaintiffs' petition, would be contrary to our bill of rights, and against first principles.

VII. It follows, also, that such a taking falls within the prohibition of the Fourteenth Amendment to the Constitution of the United States.

WM. LITTLE, *Att'y for Head.*

The foregoing motion was granted Dec. 22, 1880.

L. S. MORRILL, *Clerk.*

Endorsed on cover: New Hampshire supreme court. No. 387. Samuel Head, plaintiff in error, *vs.* The Amoskeag Manufacturing Company. Filed 12th October, 1881.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1884.

SAMUEL HEAD, PLAINTIFF IN ERROR,

v.

THE AMOSKEAG MANUFACTURING COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case 1–5
Specification of Errors 5–6
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SUPREME COURT OF THE UNITED STATES.

October Term, 1884.

SAMUEL HEAD, PLAINTIFF IN ERROR,

v.

THE AMOSKEAG MANUFACTURING COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

I. The cause in which this writ of error arises was a petition by the Amoskeag Manufacturing Company, a corporation doing business at Manchester, in the State of New Hampshire. The petition was filed at the April term, 1875, of the then Circuit Court for the county of Merrimack in said State. Judgment was rendered at the April term, 1880, of the Supreme Court, the successor of said Circuit Court. A bill of exceptions allowed at the same term was over-ruled, or rather the exceptions were over-ruled at the law term of the Supreme Court of said State, held by adjournment of March adjourned term, September 2, 1880.

The federal question involved from first to last was the constitutionality of the flowage acts of said State, chapter 20, Laws of 1868, and chapter 141 of the General Laws. This question was presented upon demurrer to the petition, at the April term, 1875, of said Circuit Court, and which demurrer was over-ruled at the March adjourned term of the December law term, 1875, of the Supreme Court. At the argument upon the demurrer the counsel for Head took the following positions: —

1. "The public have no other or different rights in respect to the property or business of the plaintiff than in respect to the property and business of any and every person and corporation in the State.

2. If the legislature can authorize the taking of the defendant's property by the plaintiffs without his consent, it can authorize the taking of his property by any corporation or person, whether engaged in manufa turing, trading, farming, or mechanical business, for every useful business is conducive to the public welfare.

3. And it can authorize towns and cities to loan their credit and impose taxes in aid, not only of the plaintiff's business, but of any laudable, private and mere private enterprise, for it can impose taxes for any object for which it can take private property.

4. And it can also take the plaintiff's mills and water-power, not only for the use of some other corporation engaged in like business, but even for the

benefit of any lawful scheme for money-making by which the public would be more or less benefited.

5. On the contrary, we say that a taking for "public uses" within the meaning of our constitution, is only when there is a taking for the use of the public in some form, and that use not permissive but of right, and by compulsion if need be.

6. It follows that the taking of the defendant's property without his consent, as prayed for in the plaintiff's petition, would be contrary to our bill of rights, and against first principles.

7. It follows, also, that such a taking falls within the prohibition of the fourteenth amendment of the Constitution of the United States."

See Transcript, pp. 9, 10, 24, 25; and 56 N. H. R. 387, 388.

The question was again presented by a protest filed at the April term, 1876, of said Circuit Court, which entitled in the cause was as follows: —

"The said Head objects that if said petition is to be tried at all, it should not be by a committee appointed by the court, but by a jury of the county; but he also objects and protests that the contemplated appropriation of the defendant's property is not a public use, and that the taking of it would be depriving him of his property without due process of law, in violation of the fourteenth amendment of the Constitution of the United States, and he respectfully insists that the act under which said petition was filed, being chapter 20 of the Laws of 1868, so far as it attempts to authorize the taking of the defendant's property in the manner and for the uses contemplated by the petition, is contrary to the aforesaid amendment, and is null and void."

See Transcript, p. 10.

It was again presented at the April term, 1879, of the Supreme Court, in a paper filed for the purpose of obtaining the opening and close in the assessment of damages, if against the protest damages were ordered to be assessed.

"The said Samuel Head, protesting that the said statutes or acts of the legislature, under which the said company claim an assessment of damages, upon the payment of which or tender thereof they shall obtain a right to flow his land and appropriate his property to their use, is in violation of Sect. 1 of Art. XIV. of the amendments to the Constitution of the United States, which provides that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, inasmuch as the use to which said Head's property is thus sought to be appropriated is a private use and not a public use."

See Transcript, pp. 10, 11.

The question arose again at the trial, when, as stated in the case: —

"The defendant moved for the opening and close, denied subject to exception. The plaintiff gave evidence, subject to the defendant's exception, of its character, the erection of its works, their extent, the number of persons employed, and generally of the facts stated in the petition. The court having intimated the finding, that the raising of the dam was a public use, within the meaning of the statute, the defendant and plaintiff gave evidence as to the damage done the defendant thereby. Then the defendant again moved for the close; also that the petition be dismissed because the evidence showed only a private use. Both motions were denied, subject to exception. * * * The only question formally submitted to the jury was the one of damages. The defendant excepted to the form of the verdict, and filed his exception with the clerk."

The verdict as first returned was : —

"The jury in the case of Amoskeag Corporation against Samuel Head, agree to a verdict of damages of three hundred fifty-eight and thirty-three and one-third one-hundredths dollars."

As put in form against Head's protest it was : —

"The jury assess the damage of said Head arising under the facts claimed as alleged and set forth in the petition in said case, in the sum of three hundred fifty-eight dollars and thirty-three and one-third cents."

The protest against the change of verdict entitled in the cause says : —

"The jury having returned a verdict assessing the damages, the said Head objects and excepts to the ordering of the special verdict in addition thereto, because there was no evidence introduced or offered to prove that the taking of the property would be a taking for the public use, and because the same would be in violation of the Constitution of this State, and of Sect. 1 of Art. XIV. of the amendments of the Constitution of the United States, which provides that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

See Transcript, pp. 12–18.

The question again arose at the April term, 1880, of the Supreme Court, upon motion in arrest of judgment and rulings of the court in the same, as stated in the bill of exceptions to be found on pages 23, 24 of the Transcript. The court in denying said motion, —

"Decided that the taking contemplated by said petition and provided by said statutes, would be a taking for public uses within the meaning of the tenth clause of the first article of the bill of rights of said State; that said statutes are not in violation of the Constitution of the United States, nor of the fourteenth amendment to the same, and that the defendant is not exempted by said fourteenth amendment from having his property, mentioned in said petition, taken by the plaintiffs as contemplated by their said petition; denied said motion, and ordered and decreed that upon payment or tender of the amount of damages assessed by the jury, with fifty per cent added, said corporation should be forever discharged from any liability in relation to the premises of the defendant described in said petition, which is made a part of this case, by reason of the using or flowing the same for the use of the mill or mills in said petition mentioned, after the 24th day of July, 1878, as will appear more at length by the decree on file, and which is made a part of this bill of exceptions. To which ruling, denial and order the defendant excepts, and files this bill of exceptions, which is allowed by the court."

The extended decree will be found on page 13 of the Transcript.

The petition (pp. 15, 16 of the Transcript), after stating a charter to carry on the manufacture of cotton, woolen, iron, and other lawful manufactures, the erection of a dam and mills at a cost of several millions of dollars, the placing of flash-boards on the dam, the digging of canals, that the company have encouraged others to

erect mills and works at a cost of several millions more, and that the company intends erecting other works and mills at large expense, alleges, that "the construction of said mills and dam and placing flash-boards thereon to raise the water for working said mills and works, and for creating a reservoir of water, and for equalizing the flow of the same for the use of such mills, is of public use and benefit to the people of this State, and the same is necessary for the use of the mills for which it is designed."

It alleges Head's ownership, and notice from him of pretended damage, and that the company was unable satisfactorily to adjust the same. It prays, "that a view of said premises may be had, and the parties heard; that it may be determined by said court whether the construction of such mills and canals, and the erection of said dam with said flash-boards forming a part of the same, as constructed by said corporation, and the flowing, if any, of said land to the depth and extent that the same may or can be flowed, or otherwise injured by said dam and flash-boards, is or may be of public use or benefit to the people of this State, and whether the same is necessary for the use of the mills already erected, and that are designed to be erected, and for which it was designed; and that the damages that have been done, or that may be done, to said premises, if any, by the construction of said dam, and the placing flash-boards thereon as part thereof, may be assessed in accordance with the provisions of the statute."

ACT OF 1868.

The first section provides that "any person, or any corporation authorized so to do, may erect and maintain on his or its own land, or upon land of another with his consent, a water-mill, and dam to raise the water for working it, or for creating a reservoir of water, and for equalizing the flow of the same, for its use and of mills below, upon and across any stream not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed."

Section two provides for the appointment of a committee upon application of either party if the land of any person shall be overflowed, drained, or otherwise injured by the use of such dam, and the damages are not satisfactorily adjusted.

Section three provides that the committee shall give notice, hear the parties, and view the premises, "and if they shall be of opinion that the flowing or draining of said land, to the depth and extent that the same may or can be flowed by said dam, is or may be of public use or benefit to the people of this State, and that the same is necessary for the use of the mill or mills for which said dam was designed, they shall estimate the damages, and make report to the said court at the next term thereof after said view and estimate. Upon the return of the report of said committee, any person interested therein may object to the acceptance of the same for any irregularity or improper conduct of said committee; and said court may set aside said report for any just and reasonable cause, and, if

required, shall inquire for itself whether the erection of said dam is of public use or benefit, any finding of the committee upon that point notwithstanding; and, if the court shall be of opinion that the erection of said dam is not of public use or benefit, the petition shall be dismissed. But, if the report shall be accepted and established, the court shall render judgment thereon, after adding fifty per cent to the estimate of damage; which judgment shall be final, and execution shall issue thereon. Before the reference of such petition to the committee, if either party shall so elect, said court shall direct an issue to the jury to try the facts alleged in the said petition, and assess the damages; and judgment rendered on the verdict of such jury, with fifty per cent added, shall be final, and said court may award costs to either party at its discretion."

Section four requires payment or tender of the amount of the judgment before any exemption by reason of the proceedings.

Section five contains exceptions not material here.

And section six makes the act to take effect from its passage.

II. The errors may be resolved into the one error of taking private property for private uses, but as variously stated in the assignment of errors (Transcript 4 and 5) and relied upon are as follows: —

1. Because the Supreme Court of said State over-ruled the demurrer of said Head under which said Head assigned as cause of demurrer that the taking of the property of said Head, prayed for in the petition of the said company, was within the prohibition of the fourteenth amendment to the Constitution of the United States.

2. Because said court denied said Head's motion in arrest of judgment, which was based by him upon the following grounds by him specified. [See motion in arrest of judgment, *ante*, p. 3, and p. 4 of Transcript.]

3. Because said court decided that the taking contemplated by said petition and provided for by said statutes would be a taking for public uses within the meaning of the tenth clause of the bill of rights of said State.

4. Because said court decided that said statutes are not in violation of the Constitution of the United States, nor of the fourteenth amendment to the same.

5. Because said court decided that said Head is not exempted by said fourteenth amendment from having his property mentioned in said petition taken by said company, as contemplated by their said petition.

6. Because said court ordered and decreed that upon payment or tender of the amount of damages which had been assessed by the jury against the protest of said Head, with fifty per cent added, said company should be forever discharged from any liability in relation to the premises of the said Head described in said petition, by reason of the using or flowing of the same for the use of the mill or mills in said petition mentioned, after the 24th day of July, 1878.

7. Because said court over-ruled the bill of exceptions of said Head to the denial and ruling and decree aforesaid, the same being a final decree.

8. Because the said court, against the written protest of said Head, directed the jury to assess damages, and to return and sign the verdict appearing in the record of said cause.

9. Because said court should have ordered and decreed that the petition aforesaid be dismissed.

10. Because in said suit, at the March adjourned term, 1876, of the December law term, 1875, of the Superior court of Judicature, then being the highest

court of said State, and to whose powers and duties said Supreme Court of said State succeeded, said Superior Court over-ruled the demurrer of said Head to said petition, under which was assigned as cause of demurrer, that the taking prayed for by said petition and provided for by the statutes aforesaid, the same being for private and not to a public use, is within the prohibitions of the fourteenth amendment to the Constitution of the United States.

11. Because said Supreme Court of said State in said cause, at the April term thereof, 1879, over-ruled the objection of said Head, that there was no evidence introduced or offered to prove that the taking of the property of the said Head would be a taking for a public use, and the same would be in violation of the Constitution of the said State, and of the first section of Art. XIV. of the amendments of the Constitution of the United States, which provides that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and which said decision of said court was affirmed and sustained by said court at the law term thereof holden by adjournment at said Concord in March, 1880.

III. BRIEF OF ARGUMENT.

1. The fourteenth amendment binding upon every State in all its departments, exempts and protects private property from a taking for other than public uses in the proper sense of the term. Parkersburg v. Brown, 106 U. S. 487; Ex Parte Virginia, 100 U. S. 339; Dundee Mortgage v. School District, 19 Fed. Rep. 360; Clark v. Mitchell, 69 Mo. 628; County of Santa Clara v. Southern Pacific R. R., 18 Fed. Rep. 386, 397; Sonoma County Tax Case, 13 Fed. Rep. 789; San Mateo County v. Railroad Co., 13 Fed. Rep. 722; Olcott v. The Supervisors, 16 Wall. 678.

2. "Now whether a use is public or private is not a question of constitutional construction. It is a question of general law." And hence the decision of the state court in this or any previous cause upon the federal question of public or private use, has only such force as the opinion of any other court equally respectable. See cases above cited, and Hagar v. Reclamation District, 111 U. S. 701, 704; Hollingsworth v. Parish of Tensas, 17 Fed. Rep. 109; Louisville & N. Railroad v. Palmes, U. S. Supreme Court, October Term, 1883, Am. Law Reg. for Jan'y, 1884, p. 67; Lavin v. Emigrant Savings Bank, 8 Blatch. 13; Bradley v. Lill, 4 Biss. 473; Thomas v. Hatch, 3 Sumn. 170; Butz v. City of Muscatine, 8 Wall. 575.

3. There has been but one decision upon the merits, that in Company v. Fernald, 47 N. H. 444. The question was presented in Ash v. Cummings, 50 N. H. 592 (but as stated on page 621 the court did not find it necessary to pass upon it); and again in Manufacturing Co. v. Head (the present cause), 56 N. H. 386, and 59 N. H. 332, 563, the court declined to treat the question as an open one.

4. The decision in Company v. Fernald may be entitled to less weight than that sometimes accorded to the opinions of New Hampshire courts.

(a.) If not a friendly suit there was not a vigorous defense, as may be seen by comparing the defendant's constitutional argument

on page 446 with that upon the other side, pp. 447–453, or with the argument in Ash v. Cummings 50 N. H. 592–602, and 56 N. H. 388–399.

(b.) The opinion rests upon no historical basis, although if it were otherwise, the precedent would not be of much force. For as said by the present chief justice of that court of another requirement: "There may have been in our legislation some instances of nominal inequality, not so substantially unjust as to have any weight as precedents of actual wrong, or authorities for the introduction of exceptions in the application of the rule. * * * The great mass of questions of constitutional interpretation and administration, raised by the progress of society and the enlarged and complicated interests and industries of future generations, were left for these generations to solve. And even if it could be shown that they who adopted the constitution did not understand that it prohibited unequal taxation, we have the highest authority for adhering to the plain meaning of the document." Doe, C. J., in State v. U. S. & C. Express Co., March term, 1881, citing Merrill v. Sherburne, 1 N. H. 199.

When the constitution was adopted in 1792, no *private* act had given a right to take private property against the will of the owner. 47 N. H. 459.

From the repeal in 1792 of the mill act of 1718, down to 1868, there was no *general* statute authorizing any such taking. 47 N. H. 449, 459.

The mill act of 1718 (Prov. Laws 1721, c. 60) secured a public use, as far as grist-mills were concerned; a toll to be taken, "and no more."

And from what appears in the comparatively few and imperfect town histories that have been published, it would seem that in respect to saw-mills as well as grist-mills (and such mills were the first erected), a public use was fully secured by the terms of the grant. Thus the first saw-mill and grist-mill in Penacook (now Concord), N. H., about 1728 were under grants of fifty pounds for each, and fifty acres of land. The grantees respectively were obliged "to supply the town with good merchantable boards, of yellow pine, at thirty shillings per M., and good merchantable white pine boards at forty shillings per M., or else to saw each sort by the halves," and "to grind the town's corn, of all sorts, well and free from grit, for the usual toll;" and lastly "the persons that should build said mills shall be entitled to the said lands, and also the stream or streams upon which said mills shall stand, and be, so long as they are kept in good repair, and the end and design of the town in having said mills answered." Bouton's History of Concord, N. H., 87–93. For other New Hampshire town grants, see Annals of Portsmouth, p. 42; His. of Amherst, 38, 40, 41; His. of Boscawen and Webster, 17; His. of Chester, 207, 209; His. of New Ipswich, 53, 55; His. of Nottingham, etc., 91; of Henniker, 70; of Mason, 35–47; of Chesterfield, 38; of Marlborough, 27, 33; of Warner, 47, 109, 125; and of Sanbornton, 207, 209.

The grantee of the privilege for the first grist-mill in New England (1634), was "not to sell or convey the mill without consent of the plantation." This restriction was not taken off until 1785. His. of Dorchester, 34, 600, 603. In like manner grantees in Groton, Mass., in 1665, 1673, and 1681, were obliged to grind the town's corn sufficiently, "taking common toll only," and to saw at specified rates and terms. Butler's His. of Groton, 36, 37. For other Massachusetts towns see His. of Dunstable, p. 40; of Newbury, 27, 43; of Gloucester, 202; of Hadley, 47, 48; of Ipswich, 95; of Salem (Felt), 97; of Boston (Drake), 691; Annals of Lancaster, 56; and Ancient Landmarks of Plymouth, 139–142.

The colonial statutes were, it is obvious, in general dealing with mills in which a public use upon reasonable terms was secured by grant, reservation, or statute, and were not, so far, any great departure from sound principles; and in New Hampshire, there was no flowage act for almost three quarters of a century after the repeal of the colonial act in 1792.

The court in Company v. Fernald cite only two *private* acts giving a right to flow, prior to 1861, that to Jonas Warren and others in 1810, and that to the Sunapee Dam Corporation in 1820. As stated by counsel in 56 N. H. R. 393, 394, there was no reference of the bills to the judiciary committee; it is probable they were made satisfactory to the contestants, and no question arose after their passage.

A few aqueduct charters were cited by the court in Company v. Fernald. These upon their face were for a public use by the inhabitants of the town, and the company would be liable to suit or indictment for refusing water upon reasonable terms. Lumbard v. Stearns, 4 Cush. 60; Charles River Bridge v. Warren Bridge, 7 Pick. 447; Turnpike Company v. News Company, 43 N. J. Law, 381, 384; Lowell v. Boston, 111 Mass. 464; 16 Gray, 426, Talbot v. Hudson; Bridge Co. v. Railroad Co. 17 Conn., 40, 65; Bennett v. Dutton, 10 N. H. 481; Pierce v. Emery, 42 N. H. 484, 504; Richards v. Railroad, 44 N. H. 127, 136; 11 Peter's Rep. 615, 630, 631, 639, Charles River Bridge v. Warren Bridge; 3 Kent's Com., 458.

The same is true of turnpike, canal and boom companies cited by the court (47 N. H. R. 459); a public use is fully secured by law. They are plainly distinguishable from a mere manufacturing corporation.

Acts passed in 1861 and 1862, under the circumstances stated by counsel in 56 N. H. R., 392, 393, are not a feather's weight upon the question before the court in Company v. Fernald, as to the constitutionality of one of those acts.

(c.) The opinion in Company v. Fernald is inconsistent with the decision of the same judge in Petition of Mt. Washington Road Co., 35 N. H. 134, and with the well considered case of Railroad v. Greeley, 17 N. H. 47, 56, and with the opinions of New Hampshire judges in other cases, and particularly that of Judge Woodbury, than whom no New Hampshire jurist better understood the

legislative and judicial history of our State or was better qualified to understand and apply correct principles of constitutional law. Backus v. Lebanon, 11 N. H. 23; Bridge v. Dix, 6 How, 546–7; Bridge v. Bridge, 7 N. H. 68, 69; Barber v. Andover, 8 N. H. 399; Pierce v. Somersworth, 10 N. H. 373, 374; Doe, C. J., in Orr v. Quimby, 54 N. H. 608, 615, 646.

(d.) The court in Ash v. Cummings was not prepared to reaffirm the constitutionality of the act. Nor in Company v. Head was it prepared to vindicate the law. On the contrary Judge Ladd (56 N. H. 400) says: "I fully appreciate the argument against the conclusion reached by the court in Company v. Fernald, and if the question could properly be regarded as an open one, I am not now prepared to say what my conclusion would be upon it."

5. And courts and judges who have sustained similar statutes have, as it were, apologized for it, or expressed grave doubts of their validity, if regarded as an open question. Miller v. Troost, 14 Minn. 365, 367, 369 (1869); Scudder v. Trenton & Delaware Falls Co., Saxton, 696, 726, 730; Jordan v. Woodward, 40 Me. 317, 324 (1855); Fisher v. Horicon Iron & Man'g Co., 10 Wis. 351, 353; Powers v. Bears, 12 Wis. 221; Pick v. The Rubicon Hydraulic Co., 27 Wis. 434; Harding v. Funk, 8 Kan. 315, 323; Venard v. Cross, 8 Kan. 249, 262.

6. And in Massachusetts it has been denied that there is any taking to a public or private use, but only, it is said, a statute *regulation* of water rights. Lowell v. Boston, 111 Mass. 454; Shaw, C. J., in Murdock v. Stickney, 8 Cush. 116–17; Shaw, C. J., in Bates v. Weymouth Iron Co., 8 Cush. 553; Fisk v. Framingham Man. Co., 12 Pick. 68; Williams v. Nelson, 23 Pick. 141.

7. But the idea that there is not a *taking*, where water is thrown back upon land, is repudiated in New Hampshire as well as elsewhere, and finally in *this* court. Eaton v. Railroad, 51 N. H. 504; Winn v. Rutland, 52 Vt. 481, 494; Inman v. Tripp, 11 R. I. 520, 525; Nevins v. Peoria, 41 Ill. 502; Pettigrew v. Evansville, 25 Wis. 223; O'Brien v. St. Paul, 18 Minn. 176; City of Columbus v. Woolen Mills Co., 33 Ind. 435; Thompson v. Androscoggin Co., 54 N. H. 545; Arimond v. Canal Co., 31 Wis. 316, 331; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 309, 321; Lee v. Pembroke Iron Co., 57 Me. 481; Weaver v. Miss. etc., Boom Co., 28 Minn. 534, 539; Pumpelly v. Green Bay Co., 13 Wall. 166; Rigney v. City of Chicago, 102 Ill. 64, 72; Hollingsworth v. Parish of Tensas, 17 Fed. Rep. 109 (1883); Jones *et al.* v. United States, 48 Wis. 385, 403–4; Broadwell v. City of Kansas, 75 Mo. 213, 218.

8. The common law right of a riparian owner, being that the level of the water at his boundary shall not be changed, the Company in using Head's land as a part of their mill-pond or reservoir, appropriate to their own use property belonging to him, which as a part of the whole water-power has a value far beyond its value for any other purpose. It is an actual appropriation of property, and not a mere damage to property, although this seems to have been overlooked in the Massachusetts and Connecticut cases. But the

rule is not changed by the fact that the property taken without right is valuable chiefly for the purpose for which it is thus taken. "No man has a right to appropriate his neighbor's land to his own use, even for a temporary purpose. * * * If it is very important for him to have it, let him buy it." McCoy v. Dewley, 20 Pa. St. 85. See also Gould on Waters, section 210; Company v. Goodale, 46 N. H. 53; Great Falls Co. v. Wooster, 15 N. H. 413; Boom Co. v. Patterson, 96 U. S. 403; Young v. Harrison, 17 Ga. 30.

The presumed disregard of this principle by the jury in this case, and its observance by the referees, may in part account for the different results (see Transcript pp. 19, 20, 21), although the rejection of the defendant's evidence of sums paid to others, and the denial of his right to the close on the question of damages (which alone was passed upon by the jury) largely contributed.

9. The police power of a State to restrict the uses to which one may put his own property, is quite a different thing from the attempted grant of a right to appropriate the property of another. Munn v. The People, 69 Ill. 81; Munn v. Illinois, 94 U. S. 113; State v. Wheeler, 41 N. J. Law, 88; Bancroft v. Cambridge, 126 Mass. 438, 441; Davidson v. New Orleans, 96 U. S. 107; Winn v. Rutland, 52 Vt. 481, 495; Hollingsworth v. Parish of Tensas, 17 Fed. Rep. 109; New Orleans Co. v. St. Tammany Water Co., 14 Fed. Rep. 194; Beer Company v. Massachusetts, 97 U. S. 25, 32, 33; Water Works Co. v. St. Tammany Co., 4 Woods C. C. 134; Keller v. Corpus Christi, 50 Tex. 614; Escubana Co. v. Chicago, 107 U. S. 679, 683; Louisville Co. v. Railroad Commission, 19 Fed. Rep. 679.

The police power proper may be exercised without compensation. Eminent domain must be *with* compensation, and for public uses only, although the occasion for its exercise may be necessary regulations for health, morals, and good order in the community.

10. The public has a right to pure air as much as to pure water, and hence there doubtless may be a taking to prevent or remove nuisances, as by draining swamps. Donnelly v. Decker, 58 Wis. 461; New Orleans Co. v. St. Tammany Co., 14 Fed. Rep. 194; Shelley v. St. Charles Co., 5 McCrary's C. C. 474; Hagar v. Reclamation District, 111 U. S. R. 701; Hartwell v. Armstrong, 19 Barb. 166.

11. Private roads, so called, have in general been sustained, or condemned, according as courts have or have not found that the public have a right to use them, even if not compelled to repair them. Brewer v. Bowman, 9 Ga. 37, 41; Robinson v. Swope, 12 Ky. 26; Sherman v. Buick, 32 Cal. 241, 255; Allen v. Stevens, 29 N. J. Law R. 509; Wild v. Deig, 43 Ind. 455, 460; Bankhead v. Brown, 25 Iowa, 540; Sadler v. Langham, 34 Ala. 311; Nesbit v. Trumbo, 39 Ill. 110; Dickey v. Tennyson, 27 Mo. 373; Osborn v. Hart, 24 Wis. 89; Taylor v. Foster, 4 Hill, N. Y. 140; 2 Kent's Com. 340, note; Crear v. Crossly, 40 Ill. 175; Reynolds v. Reynolds, 15 Conn. 84; Clack v. White, 2 Swan, Tenn., 540. Underwood v. Bailey, 59 N. H. 480. Proctor v. Andover 42 N. H. 348, 360.

In Pennsylvania such roads have been sustained because, *it is said*, not the land itself, but only a right of way over it is taken, and because of a reservation for roads in every grant of land by the State; it is assumed that under such a reservation, the State may provide such roads as it pleases. Harvey v. Lloyd, 3 Barr, 331, 336, 341; Shornberger v. Mulhollan, 8 Barr, 134, 146.

12. Whatever is a public use for the exercise of eminent domain, is a public use for the exercise of the taxing power. Renwick v. Davenport & N. W. Railroad, 47 Iowa, 512; Town of Bennington v. Park, 50 Vt. 178, 194–9; Stewart v. the Board of Supervisors, 30 Iowa, 10; Talbot v. Hudson, 16 Gray, 417; Commercial Bank v. City of Iola, 2 Dillon, 353,363. "The same test must apply to and control in each." Wells J. in Lowell v. Boston 111 Mass. 454,462.

13. Aside from direct decisions under mill acts, prior to Company v. Fernald (1867), to the contrary of the conclusion arrived at in that case, principles had been laid down by eminent judges and courts which, if followed, must have led to a different result. We quote from some of them:

"If the public can pass and repass and enjoy its benefits by right, it matters not whether the toll is due to the public or a private corporation; the true criterion is whether the object, uses, and purposes of the corporation are for public convenience or private emolument, and whether the public can participate in them by right, or only by permission." Baldwin J. in Bonaparte v. Camden & Amboy Railroad, 1 Bald. 205, 223. (1830.)

In another leading case, Beekman v. Saratoga, etc., Railroad, 3 Paige, 45 (1831), although there are some observations of a more general character, the taking is justified upon the ground that "the public have an interest in the use of the road, and the company are liable to respond in damages if they refuse to transport an individual or his property without reasonable excuse, being paid at proper rates for transportation, and the legislature may regulate the use of the franchise, and limit the amount of toll unless they have deprived themselves of that power by the contract." This is quoted and approved, in Railroad v. Chappell, 1 Rice, 399. (1838.)

"The user must be for the people at large, for travelers, for all, must also be compulsory for them and not optional with the owners, — must be a right by the people, and not a favor, must be under proper regulations as to tolls, or owned or subject to be owned by the State, in order to make the corporation and object public for a purpose like this." Mr. Justice Woodbury in West River Bridge Company v. Dix, 6 How. 546. (1847.)

"Although the company may use the bridge for its own profit, yet it must permit its use by the people for a public convenience as a common highway. * * * It is this object of public use and right to enjoy it that makes it a public highway and legalizes the contested authority conferred by the charter." Arnold v. Bridge Co., 1 Duvall Ky. 374. (1864.)

"For public uses government has the right to take private property giving just compensation; but for a public convenience, it

has not. * * * The use must be for the people at large, and must be compulsory by them and not optional with the corporators; it must be a right in the people, and not a favor, and under public regulations as to tolls." Memphis Freight Co. v. Mayor & Aldermen of Memphis, 4 Cold. 419. (1867.)

This rule, that the taking must be *for the use of the public*, through some instrumentality, and that use not permissive only, *but of right*, is recognized in many other cases before and since, and is the only one that will bear examination. Nothing *short* of this, is a taking for public uses. Harding v. Funk, 8 Kansas, 323, 324 (1871); Scuffletown Fence Co. v. McAllister, 12 Ky. 312; Robinson v. Swope, 12 Ky. 21, 26; Cummings v. Peters, 56 Cal. R. 596–7; Leisse v. St. Louis, etc., Railroad Co., 72 Mo. 561; Turnpike Co. v. News Co., 43 N. J. Law, 381, 384; Crenshaw v. Slate River Co., 6 Rand. 245; Dickey v. Tennyson, 27 Mo. 373; Lance's Appeal, 55 Pa. St. 16; Williams, C. J., in Bridge Co. v. Bridge Co., 17 Conn. 64, 65; Bloodgood v. Railroad, 18 Wend. 15; Township of Burlington v. Beasley, 94 U. S. 310, 314; Whitney v. Railroad, 25 Wis. 167, 182, 194, 196; White v. White, 3 Barb. 483; Van Horn v. Dorrance, 2 Dall. 307, 316; Mills on Eminent Domain, section 287; Gould on Waters, 448, 9; Finnerly v. Somerville, 80 Pa. St. 59, 65; and other cases cited in this brief.

14. And any other principle would afford no protection, since it is agreed on all hands that the judiciary cannot question the propriety of taking, except as involved in the question, whether for a public use.

15. If a public *benefit* is all that is required to constitute a public *use*, the legislature (as expressed in the New Hampshire Constitution) may make *any* law upon the subject which "*they* may judge for the benefit and welfare of the State." In the matter of Peter Townsend, 39 N. Y. 171; in the matter of William A. Fowler, 53 N. Y. 60; in the matter of Cooper, 28 Hun, 524; Harris v. Thompson, 9 Barb. 365; and other cases before cited.

"If this is the kind of public use for which a man's property may be taken, there is practically no limit to legislative power. It would result that, whenever the legislature deem it expedient to transfer one man's property to another upon a valuation, they can effect their object. What that department considers and pronounces to be the policy of the commonwealth, the judicial department must accept as such." Palairet's Appeal, 67 Pa. St. 488.

16. The New Hampshire statute following the Massachusetts and Connecticut doctrine, that a taking will be sustained unless the court can see that a public benefit will *not* accrue, (Talbot v. Hudson, 16 Gray, 423; Olmstead v. Niles, 33 Conn. 550;) does not require a finding (and there has been no finding) that the taking *will* be of public use or benefit, but only that it *may be*. See Transcript, pp. 9, 18, 19.

17. A legislature cannot authorize taxes in aid of literary institutions of a private character over which the town authorities have no rightful supervision and control, notwithstanding the inci-

dental benefits to the community from such institutions. Jenkins v. Andover, 103 Mass. 94; Curtis v. Whipple, 24 Wis. 350. Nor can it authorize a town to loan money to be raised by taxation, to enable real-estate owners to build up after a general conflagration, notwithstanding the great incidental benefits that may come to the community. Boston v. Lowell, 111 Mass., 454.

18. Similar mill acts have been decided void in Alabama, Georgia, Michigan, New York, Tennessee, and Vermont, besides being questioned by judges in other States. Sadler v. Langham, 34 Ala. 311; Bottoms & Powell v. Brewer & Brewer, 54 Ala. 288; Loughbridge v. Harris, 42 Ga. 505; Ryerson v. Brown, 35 Mich. 333; Hay v. Cohoes Co., 3 Barb. 42; Harding v. Goodlett, 3 Yerg. 32, 55 (1832); Tyler v. Beacher, 44 Vt. 648; Stow, C. J. and Larrabee, J., in Newcomb v. Smith, 1 Chand. Wis. 71; Hinman, C. J., in Olmstead v. Niles, 33 Conn. 550.

"We are free to confess that if the question as to the constitutionality of the mill-dam law were now for the first time presented to this court, and we were not embarrassed by former adjudications upon it, we should doubtless come to a different conclusion from that arrived at by the majority of the court in Newcomb v. Smith." Fisher v. Horicon Iron Man'g Co., 10 Wis. 353. (1860.)

"The mill-dam law, so called, was sustained contrary to the individual convictions of all its present members, on the ground that the earlier decisions upon it had made it a rule of property which could not, with a due regard to individual interests, be departed from." Powers v. Bears, 12 Wis. 221. (1860.)

In Pick v. The Rubicon Hydraulic Co., 27 Wis. 434 (1871), the court leave the question open whether the legislature can authorize perpetual flowage by a dam not erected for a grist or custom mill.

"Now if the mill is to be absolutely a private mill, the defendants in error would have no right to erect their dam, as the dam would in such case be solely for private use." Harding v. Funk, 8 Kan. 223. The court go on to say that under their statute the mill may properly be called *quasi* public." The statute referred to (chapter 65 of the Gen. St's) says, "that all water, steam, wind, and other mills whose owners or occupiers grind or offer to grind grain for toll or pay are hereby declared public mills;" and it regulates the use, and limits the toll. See also Mills on Eminent Domain, s. 287.

"Strictly speaking, private property can only be said to have been taken for public use when it has been so appropriated that the public have certain and well defined rights to that use secured, as the right to use the public highway, the turnpike, the public ferry, the railroad, and the like. But when it is so appropriated that the public have no right to its use secured, it is difficult to see how such an appropriation can be denominated a public use." Jordan v. Woodward, 40 Me. 324. (1855.)

"It is difficult to reconcile these statutes upon principle with the constitutional rights of the citizen." Miller v. Troost, 14 Minn. 369. (1869.)

19. So even at the time of the decision in Company v. Fernald the weight of authority was against its correctness; and the preponderance has greatly increased since.

20. And, finally, it is now settled law in this court of last resort as well as elsewhere, that a legislature cannot authorize taxes in aid of manufacturing corporations; and a use that is not a public use for the imposition of taxes, is not a public use for the appropriation of property under the right of eminent domain. The very ground upon which the power to tax in aid of manufacturing corporations is denied, is that it is taking a part of the property of the citizen for the private use and benefit of another. How then can the legislature take a much larger part, *for the same use*, against the will of the owner? Allen v. Inhabitants of Jay, 60 Me. 124; Cole v. City of LaGrange, 19 Fed. Rep. 871; Commercial National Bank v. City of Iola, 2 Dillon, 353, 362–3; English v. The People, 96 Ill. 566; Loan Association v. Topeka, 20 Wall. 660; Parkersburg v. Brown, 106 U. S. 487, 501; Brewer Brick Co. v. Inhabitants of Brewer, 62 Me. 62; Weismer v. the Village of Douglass, 64 N. Y. 91.

In one of these cases the court *in terms* put the use as the same whether one's property is taken by taxation or eminent domain, in aid of manufacturing, and declare it private; "The question under discussion must be determined upon some principle, and I hold it to be sound doctrine that the mere incidental benefits to the public or the State which result from the pursuit by individuals of ordinary branches of business or industry, do not constitute a public use in a sense which justifies the exercise of either the power of eminent domain, or of taxation. If this salutary principle be abandoned, we unsettle the foundations of private property, and unwisely open the door for fraud and abuses of the most alarming character." Dillon J. in 2 Dillon, 362–3, above cited.

The other cases imply as much, for as said by the same judge elsewhere (2 Dillon on Municipal Corporations, 728), "a public use or purpose is of the essence of a tax;" and hence courts in denying the power to tax in aid of manufacturing, deny that the enterprise is a public use or purpose.

The extent of the manufacturing does not change its character as essentially private, any more than the extent of rebuilding, in aid of which the tax was to be assessed in Lowell v. Boston. "As a judicial question (the court say) the case is not changed by the magnitude of the calamity which has created the emergency, nor by the greatness of the emergency, or the extent and importance of the interests to be promoted." And they also say: "If it be assumed that the private interests of the owners will lead them to re-establish warehouses, shops, manufactories, and stores; and that the trade and business of the place will be enlarged or revived by means of the facilities thus provided; still these are considerations of private interest, and, if expressly declared to be the aim and purpose of the act, they would not constitute a public object, in a legal sense."

"It matters not whether it be the building of the huge factory

of the capitalist or the cottage of the laborer, the benefits are the same in kind, and differ only in degree." Brewer Brick Co. v. Inhabitants of Brewer, 62 Me. 62.

See also particularly the opinion of Mr. Justice Miller in Loan Association v. Topeka.

The statute itself, in providing for fifty per cent additional to the award of damages, confesses that the taking is not for a public use.

C. R. MORRISON,
For Plaintiff in Error.

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SUPREME COURT U. S.
FILED
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

SAMUEL HEAD,
Plaintiff in Error,
v.
THE AMOSKEAG MANUFACTURING COMPANY.

ASSOCIATION

BRIEF FOR DEFENDANT IN ERROR.

GEO. F. HOAR,
B. WADLEIGH,
of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1884.

SAMUEL HEAD, Plaintiff in Error,

v.

THE AMOSKEAG MANUFACTURING COMPANY.

BRIEF FOR DEFENDANT IN ERROR.

I.

The only question raised by the record is whether the New Hampshire Flowage Act of 1868 (Appt.'s Brief, 4, 5) is in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States.

The highest court in New Hampshire has held that such legislation is constitutional and valid.

Great Falls Mfg. Co. v. *Fernald*, 47 N.H. 444.
Ash v. *Cummings*, 50 N.H. 591.
Pollard v. *Moore*, 51 N.H. 188.
Town v. *Faulkner*, 56 N.H. 255.
Amoskeag Mfg. Co. v. *Head*, 56 N.H. 386.

Upon the point whether such legislation is in conflict with the Constitution of New Hampshire, this Court is conclusively bound by the decisions in that state.

Luther v. *Borden*, 7 How. 1.
Pennsylvania College Cases, 13 Wall. 190.
East Hartford v. *Hartford Bridge Co.*, 10 How. 511.
Railroad Co. v. *Georgia*, 98 U.S. 359.

Post v. *Supervisors*, 105 U.S. 667, 669.
Burgess v. *Seligman*, 107 U.S. 33.
Elmwood v. *Marcy*, 92 U.S. 289.
East Oakland v. *Skinner*, 94 U.S. 255.
Walker v. *Sauvinet*, 92 U.S. 90.

The Twelfth Article of the Bill of Rights, which is a part of the Constitution of New Hampshire, has this provision: "But no part of a man's property shall be taken from him or applied to public uses without his own consent or that of the representative body of the people."

This provision has the same legal effect as has the Fifth Amendment to the Constitution of the United States.

The highest court in New Hampshire has decided that in this case the property of the appellant has been taken for public uses, and that the said act of 1868 does not contravene the bill of rights.

The Fifth Amendment to the Constitution of the United States does not restrain the legislatures of the respective states.

Barron v. *City of Baltimore*, 7 Pet. 243.
Livingston's Lessee v. *Moore*, 7 Pet. 551.
Holmes v. *Jennison*, 14 Pet. 540, 562.
Fox v. *State of Ohio*, 5 How. 410, 434, 435.
Smith v. *Maryland*, 18 How. 71, 76.
Walker v. *Sauvinet*, 92 U.S. 90.

II.

The courts of New Hampshire hold such legislation valid and constitutional upon two grounds:

1. That the use for which the land is flowed is a public one.

2. That such legislation is a constitutional regulation of the respective rights of riparian owners, similar to that by which for centuries one tenant in common of real estate has been compelled to dispose of his interest therein to his co-tenant.

Company v. *Head*, 56 N.H. 400, 401.

It is immaterial upon which of these grounds said act of 1868 is sustained.

Such legislation is not of modern growth.

In 1718, the legislature of the then Province of New Hampshire passed an act authorizing the owners of mill-sites to flow land upon paying suitable compensation. That act was as follows:

AN ACT FOR THE REGULATING OF MILLS.

SECTION 1. "Be it enacted by His Excellency, the Governor, Council and Representatives in General Assembly convened, and by the authority of the same, that every miller shall be provided of scales and weights to weigh corn, to and from the mill if desired. And the toll for grinding all sorts of grain (but Indian corn, for which the mill shall take one twelfth), viz., one sixteenth part and no more; any law, usage or custom to the contrary notwithstanding."

SEC. 2. "And be it further enacted by the authority aforesaid, that where any persons have already, or shall hereafter, set up any water mill or mills, upon his or their own lands, or with the consent of the proprietors of such lands legally obtained, whereupon such mill or mills is or shall be erected or built, then such owner or owners shall have free liberty to continue and improve such pond for their best advantage without molestation.

"And if any person or persons find themselves aggrieved and damnified in their property of lands by reason of its being flowed by the owner or occupant of such mills stopping or raising the water, that in every such case the party so damnified in his property, upon application for relief to the court of general sessions of the peace in this province, the said court be and hereby are empowered to issue out a warrant, directed to the sheriff, to summon and impanel a jury of good and lawful men, at the proper cost and charge of the owner or owners of such mill or mills; and the jury shall be sworn by a justice of the peace to a faithful indifferent appraisal of the damage done to the person complainant, by flowing his or their land or marsh; and the jurors' verdict being returned by the hand of the sheriff to the next court of quarter sessions of

this province, being allowed and recorded, shall be a sufficient bar against any action to be brought for any damages occasioned by flowing of any such lands or marsh as aforesaid, save only an action of debt which the complainant may bring for the recovery of such sum or sums of money from the owner or occupant of such mill assessed as aforesaid. But if the jury find no damage for the complainant, then he or they to be at the cost of the jury, as shall be allowed by the justices of said court."

This act was in force until 1792, when upon a revision of the statutes it was repealed.

N.H. Laws (1805), pp. 401–3.

The first Constitution of New Hampshire, adopted in 1783, contained an article in the Bill of Rights precisely like that in the present Bill of Rights.

N.H. Laws (1792), p. 24.

Therefore the act of 1718 continued in force from 1783 to 1792, nine years, while the constitutional provision was precisely the same as it ever since has been. It was not repealed on account of the new constitution, because some hundreds of other acts were repealed at the same time, and the new constitution was not established till September 5, 1792, nearly three months after the repeal of the act.

In 1810 (MS. Acts of N.H., 1810, in the office of secretary of state, p. 348), a charter was granted to Jonas Warren *et als.* to build a dam and mills on the Connecticut river between Littleton and Waterford, with this proviso:

"Provided, likewise, that the dam shall not be constructed so as to obstruct the passage of lumber in said river, nor flow any land to the damage of the owner thereof, without paying a reasonable compensation therefor."

In 1820 (MS. Acts of N.H., 1820, p. 504), a charter was granted to the Sunapee Dam Corporation, the second section of which is as follows: —

"The corporation is empowered to sink the outlet of Sunapee lake at the source of Sugar river to the depth of ten feet below low water mark of the lake, and erect and maintain a dam there with gates and flumes to the height of low water mark, for the benefit of their mills and privileges, provided said corporation shall make or tender reasonable compensation for all damages which may accrue to individuals from the erection of the dam and works."

From 1800 to 1861, numerous acts were passed authorizing the taking of land without the consent of the owner, for turnpikes, aqueducts, canals, booms, bridges, roads and railways, a list of some of which may be found in the argument of counsel in *Great Falls Mfg. Co.* v. *Fernald*, 17 N.H. 450.

In 1861, the legislature passed an act amending the charter of said Amoskeag Manufacturing Company, as follows: —

"Chapter 2548.

"*An act in addition to an act entitled An act to establish a corporation by the name of the Amoskeag Manufacturing Company.*

"Whereas, by the original act incorporating the Amoskeag Manufacturing Company, approved July 1, 1831, and by sundry amendments thereto, said corporation were authorized to erect on their real estate, such dams and canals as they might deem useful in carrying on and managing their manufactures and works, and to maintain and continue such dams and canals as had heretofore been used, or might become necessary for the purpose of navigation, manufactures, or other objects authorized by said act and said amendments thereto; and whereas the said corporation, under the authority of said act and said amendments, have erected, and now maintain and use, a dam necessary for carrying on and managing their manufactures and works; and whereas no method is provided in said act and said amendments for assessing and determining the amount of damage that may be caused by taking and using the right so to maintain and use said dam: therefore —

"Be it enacted by the Senate and House of Representatives, in general court convened:

"SECTION 1. That if any person is aggrieved or damaged by the exercise, on the part of said company, of the rights, powers and privileges in regard to said dams and canals, conferred by said acts and amendments, and used by said corporation, and such damage or grievance shall not be satisfactorily adjusted by said corporation within thirty days after notice thereof, either party may apply by petition to the Supreme Judicial Court in the county where such grievance or damage arises, to have the damages which have [been] or may be done by said corporation, assessed; and in such petition he shall distinctly set out his title to the premises damaged, or his right by reason whereof said grievance arises, and the nature of the injury, and the amount and extent of the damages that may be occasioned thereby; and said court, after reasonable notice to all persons interested, shall appoint a committee to determine in relation to the matters set forth in said petition.

"Said committee shall be first duly sworn to the faithful and impartial discharge of their duties, and shall give such notice to the parties as shall be ordered by said court; shall view the premises, and estimate the damages, and make report to the said court at the next term thereof, and said court shall render judgment thereon, which shall be final, and execution issued thereon.

"In case either party shall elect, before the appointment of said committee, said court shall direct an issue to the jury to try the facts alleged in said petition, and assess the damages; and judgment being rendered on the verdict of such jury shall be final, and said court may award costs to either party in their discretion.

"Providing that said corporation shall not derive any title from said proceedings, or be discharged from any liability in relation to said premises, until they have paid or tendered to the person aggrieved or damaged the amount of any judgment so rendered against them.

"The payment of such judgment shall bar any further action in regard to said premises.

"This bill shall in no way affect existing suits, or any right of a

town in any highway or bridge which such town may by law be liable to keep in repair.

"SEC. 2. This act shall take effect from and after its passage.

"Approved July 3, 1861."

Similar acts were passed for the benefit of the following-named corporations: —

Great Falls Manufacturing Company, July 8, 1862.
Harbor Manufacturing Company, July 8, 1862.
Nashua Manufacturing Company, July 8, 1862.
Souhegan Manufacturing Company, June 26, 1863.
National Mills, July 16, 1864.
Cheshire Mills, July 16, 1864.

Under these various acts the respective corporations have expended immense sums of money, relying upon the supply of water afforded by the improvements authorized thereby. In many cases the damage to land-owners has been so slight that they have made no claim therefor. No right to flow their lands has been gained by prescription. Should this Court hold such legislation to be unconstitutional, land-owners who have considered their damage too trifling to make any claim for it under the flowage acts, will be remitted to their common-law rights and enabled to deprive the manufacturing companies of flowage necessary to carry on their works built since said acts were passed, and in reliance upon the same.

The act of 1868 was passed July 13, seven days before the adoption of the said Fourteenth Amendment.

In December, 1867, more than six months before the adoption of the Fourteenth Amendment to the Constitution of the United States, the validity of the act of July 8, 1862, in relation to the Great Falls Manufacturing Company, came before the Supreme Court of New Hampshire in the case of *Company* v. *Fernald*, 47 N.H. 444. The opinion of the Court in that case was delivered by Chief Justice PERLEY, one of the most learned and conservative jurists of this country. The Court said, "Whether, therefore, we look to the interpretation which has been given in other jurisdictions to the term *public use*, in reference to

the right of taking private property for such a use; to the legislative practice under the provincial and state governments before and at the time when the constitution was adopted; to the language of the constitution itself; to the early and continued legislative practice under the constitution; to the decisions of the courts in this state, or to the character of our business and the natural productions and resources of the state, — we are drawn to the conclusion that the legislature have power to authorize a private right that stands in the way of an enterprise set on foot for the improvement of the water power in a large stream like this river, to be taken without the owner's consent, if suitable provision is made for his compensation; and the act of 1862 is constitutional and valid." To the doctrine laid down in *Company* v. *Fernald* the Supreme Court of New Hampshire has adhered, though in a subsequent case it has been held that the validity of this legislation could be sustained as well upon the ground of its being a regulation of the rights of riparian owners, as upon that of its being an exercise of the right of eminent domain.

Amoskeag Mfg. Co. v. *Head*, 56 N.H. 400, 401.

In Massachusetts such legislation has been in force ever since 1714. Its constitutionality has been sustained by numerous decisions.

Stowell v. *Flagg*, 11 Mass. 364 (1814).
Wolcott Woolen Mfg. Co. v. *Upham*, 5 Pick. 292 (1827).
Fiske v. *Framingham Mfg. Co.*, 12 Pick. 67 (1831).
Boston & Roxbury Mill Co. v. *Newman*, 12 Pick. 467 (1831).
Baird v. *Wells*, 22 Pick. 312 (1839).
Cotton v. *Pocasset Co.*, 13 Met. 429 (1847).
Shaw v. *Wells*, 5 Cush. 537 (1850).
Bates v. *Weymouth Iron Co.*, 8 Cushing, 548 (1851).
Murdock v. *Stickney*, 8 Cush. 113 (1851).
Hazen v. *Essex Co.*, 12 Cush. 475, 478 (1853).
Talbot v. *Hudson*, 16 Gray, 417 (1860).
Burnham v. *Story*, 3 Allen, 378 (1862).
McNally v. *Smith*, 12 Allen, 455 (1866).

Storm v. *Manchaug Co.*, 13 Allen, 10 (1866).
Lowell v. *Boston*, 111 Mass. 454, 466.

In Arkansas since 1838. Act of February 20, 1838; Digest of the Laws 1858, ch. 114; Gault's Ark. Stat. 1874, ch. 95, p. 759.

In Connecticut since 1864. Acts of 1864, ch. 26; Gen. Stat. Revision of 1875, part 6, p. 472.

In Delaware since 1852. Del. Rev. Stat. 1852 (ed. of 1874), ch. 61, p. 348; Laws of Del. 1859, ch. 537, p. 617.

In Florida since 1828. Act of November 17, 1828; Thompson's Dig. of the Laws of Florida, ch. 10, p. 401; Digest of Laws of Fla. 1822–1881, ch. 152, p. 760.

In Illinois since 1807. Laws of Indiana Territory (including Illinois) 1807, p. 194; 2 Laws of Illinois Territory 1815, p. 456. Re-enacted by the first legislature of the state, Laws of Illinois 1819, p. 265; Rev. Stat. 1883, ch. 92, p. 976, §§ 1, 11.

In Indiana since 1807. Laws of Indiana Territory 1807, p. 194; Indiana Laws, Rev. Code of 1831, p. 65; Rev. Stat. 1881, § § 882 *et seq.*

In Iowa since 1839. Act passed by territorial legislature in 1839; Iowa Ter. Stat. 1839, p. 343; act passed by state legislature, January 24, 1855; Laws of Iowa, Rev. of 1860, p. 211.

In Kansas since 1867. Act of February 6, 1867; Gen. Stat. 1868, ch. 66, p. 576; Comp. Laws 1879, ch. 66, p. 551.

In Kentucky since 1797. Act of February 22, 1797; an act reducing into one several prior acts, 2 Lit. & Sing.; Digest of Ky. Stat. p. 938; Gen. Stat. 1873, ch. 77, p. 672.

In Maine since 1840. Rev. Stat. 1840 (2d ed.), ch. 126, p. 560; Rev. Stat. 1883, ch. 92, p. 776.

In Minnesota since 1866. Stat. of Minn. (Rev. of 1866), ch. 31, p. 239; Gen. Stat. 1878, ch. 31, p. 328.

In Mississippi since 1811. Act of territorial leg. 1811; act now in force passed in 1812; Rev. Code 1824, ch. 65, p. 336; Rev. Code 1880, ch. 27, § § 924 *et seq.*

In Missouri since 1823. Act of 1823, Rev. Code of 1835, p. 405; Wagner's Mo. Stat. 1872, ch. 98, p. 948.

In Nebraska since 1873. Neb. Comp. Stat. of 1881, ch. 57, p. 355.

In New Jersey since 1831. See *Scudder* v. *Trenton Del. Falls Co.*, 1 N.J. Eq. 694.

In North Carolina since 1758. Acts of the Province of N.C. (Revision of 1773), p. 219, ch. 5 of 1758; Laws of N.C. 1791, p. 343, ch. 23 of 1777; acts of 1809, ch. 773; of 1813, ch. 863; of 1833, ch. 6; Rev. Stat. ch. 74.

In Oregon since 1865. Act of December 19, 1865; Gen. Laws of Oregon 1843–1872, ch 37, p. 674.

In Rhode Island since 1734. Acts of 1734, 1738 and 1798; Revision of 1798, p. 504; Rev. Stat. of 1857, ch. 88, p. 215; Pub. Stat. 1882, ch. 104, p. 280.

In Tennessee since 1777. Acts of 1777, ch. 23, § 2; Stat. of Tennessee (1871), ch. 10, §§ 1908–1915.

In Virginia since 1792. Act of December 21, 1792, to reduce into one the several acts then existing; Stat. at Large, vol. 1, p. 136. (See Angell on Watercourses (7th ed.), p. 752, for a complete list of the Virginia act, and the act of 1819 in full.) Code of Virginia 1873, ch. 63, p. 609.

In Wisconsin since 1840. Laws of 1840, ch. 48; Rev. Stat. 1858, ch. 56, p. 398; Stat. of Wisconsin (Taylor), vol. 1, ch. 56, p. 811. (The last reference shows the changes in legislation from the beginning to 1871.) Rev. Stat. of 1878, ch. 146, § 862.

These acts have been held to be constitutional by numerous judicial decisions.

Olmstead v. *Camp*, 33 Conn. 532.
Todd v. *Austin*, 34 Conn. 78.
Jordan v. *Woodward*, 40 Me. 317.
Jones v. *Skinner*, 61 Me. 25.
Venard v. *Cross*, 8 Kan. 248.
Harding v. *Funk*, 8 Kan. 315.
Harding v. *Goodlett*, 3 Yerg. 41.
Newcomb v. *Smith*, 1 Chand. 71; 2 Phin. 131.
Thien v. *Voegtlander*, 3 Wis. 461.
Pratt v. *Brown*, 3 Wis. 603.
Babb v. *Mackey*, 10 Wis. 371; 16 Wis. 661.

Eason v. *Perkins*, 2 Dev. Eq. 38.
Newcomb v. *Smith*, 2 Phin. 131.
Fisher v. *Horicon Iron Mfg. Co.*, 10 Wis. 351.
Scudder v. *Trenton Delaware Falls Co.*, 1 N.J. Eq. 694, 727.

III.

It is true, as argued by appellant's counsel, that some of the courts which have declared the validity of such legislation prefer to place it upon the ground that legislatures have the power to regulate the rights of riparian owners "to promote the general welfare," rather than on that of the right of eminent domain.

Gould on Waters, § 253, and auth. cited.

But it is immaterial upon what ground it is sustained. It may rest as well on the latter ground as on that of the right of eminent domain. Indeed, the restricted use and enjoyment of private property, which results from the exercise of the powers conferred by the flowage acts, is strictly analogous to the interference with proprietary rights which a tenant in common submits to when compelled by his co-tenant to make a partition of their lands. Co-owners are obliged, upon the application of any one of them, to have their respective interests apportioned, and to receive each his share in severalty, provided the property is of such a kind or so situated that a division *in specie* can fairly be made; otherwise a sale or an assignment of all to one is ordered. Successive and opposite riparian owners in respect to undeveloped water powers or mill privileges may be regarded as common owners of the capacities which the stream supplies. One may desire to utilize these powers, while another, without whose consent no improvements can be made, may refuse to co-operate in making them or permitting the other to make them. "Unless, therefore," as Judge Redfield says (in a note to the case of *Allen et al.* v. *Inhabitants of Joy*, pp. 498, 499, vol. xii., new series, American Law Register), "the legislature may pass laws enabling the owner upon one side of the stream to rest his dam upon the land of the op-

posite owner, he cannot enjoy the use of his own estate for its most important advantages. And as the owners of the opposite side of a stream are regarded in the nature of tenants in common of the use of the water, there is no more wrong or hardship in compelling one tenant of the use to surrender his interest to the other, than in any statute compelling a severance of the estate of tenants in common in lands or tenements by assigning all to one, or making a public sale of the property, which are but the ordinary provisions of such statutes found in all or nearly all the states. And again, most water powers require both a head and a fall in order to create the requisite force. One may own the fall and have no title to the land indispensable to make proper head to render the fall available for mill purposes. There is, therefore, no more violation of principle in combining these two interests for use, than in combining or separating the estate of tenants in common of the same property for the same end. . . . All land affected by the exercise of the power [to flow lands against the owner's consent] is a kind of joint estate which could not be made available for any profitable use, where each proprietor was allowed to act wholly independent of the other joint owners. *Hence there arises an absolute necessity for the interference of the law-making power, to enable the separate owners to combine their estates so as to render the property most useful.*"

The power to compel a partition of lands and tenements held in common, engrafted upon the common law by 31 Henry VIII. ch. 1, and 8 & 9 Will. III. ch. 31, remained the law of the land in America, and has never been supposed to be excluded by the constitutional provisions of any of the states, or of the United States. Acts declaratory of the common law, and also statutes bestowing additional rights and powers in respect to the law of petition for partition, are now found in every State in the Union, and have in most cases been in existence from the earliest times. Following are citations of some of the earlier acts upon the subject, the present statutory laws being so easy of access as to make references to them needless:

ALABAMA.

Statute of 1803. See Laws of Ala. 1823, tit. 18, ch. 2.

ARKANSAS.

Digest of the Statutes of Ark. 1858, ch. 122; Rev. Stat. ch. 107.

CALIFORNIA.

Compiled Laws of Cal. 1850–1853, p. 568.

CONNECTICUT.

Swift's System of the Laws of Conn. 1795, vol. 2, p. 72.
Statutes of Conn. book 1, p. 437.

DELAWARE.

Laws of Del. vol. 5, p. 154; act of 1816.

FLORIDA.

Digest of the Laws of Fla. 1822–1881, ch. 160, § 1.

GEORGIA.

Digest of Laws of Ga. 1800, p. 142; act of March 26, 1767.

ILLINOIS.

Laws of Ills. 1819, p. 385.

INDIANA.

Rev. Laws of Ind. 1824, ch. lxx., p. 274.

IOWA.

Laws of Iowa, 1839, p. 354.

KENTUCKY.

Laws of Ky., Collection of 1802, part ix., p. 233; act of 1796; same act, Littell's Laws of Ky. 1809, vol. 1, p. 510.

KANSAS.

Compiled Laws, 1862, ch. 162.

LOUISIANA.

Rev. Stat. 1870, § 2662; act of 1855.

MARYLAND.

Laws of Md., Compilation of 1802; acts of 1794, ch. 60, § 8, and of 1786, ch. 45, §§ 5, 8.

FLORIDA.

Thompson's Digest of the Laws of Fla. 1847, tit. iii., ch. 5.

GEORGIA.

Digest of the Laws of Ga. 1800, p. 142; act passed March 26, 1767. Digest of the Laws, &c., Prince, 1822, p. 258.

ILLINOIS.

Laws of Ills. 1819, p. 385; act passed Feb. 20, 1819.

INDIANA.

Rev. Laws of Ind. 1824, ch. lxx. p. 274.

IOWA.

Laws of Iowa, 1839, p. 354; act approved Jan. 4, 1839.

KANSAS.

Compiled Laws (Territorial), 1862, ch. 162; act approved Feb. 1860. Gen. Stat. 1868, ch. 80, art. xxvi.

KENTUCKY.

Laws of Ky., Collection of 1802, part ix., p. 233; act passed Dec. 19, 1796. Same in Littell's Laws of Ky. 1809, vol. 1, p. 510.

LOUISIANA.

Rev. Stat. 1876, p. 2662; act of 1855.

MARYLAND.

Laws of Md., Compilation of 1802, ch. 45, §§ 5 and 8; ch. 60, § 8; acts 1786 and 1794.

MASSACHUSETTS.

Gen. Laws of Mass. vol. 1, p. 121; acts of 1783, ch. 41. Ibid. p. 237; acts of 1785, ch. 62, § 2.

MICHIGAN.

Territorial Laws, vol. ii., p. 19 and p. 389; acts of 1809 and 1827; Rev. Stats. 1838, p. 481.

MINNESOTA.

Statutes of Minnesota, 1878, ch. 74.

MISSISSIPPI.

Digest of the Statutes of Mississippi Territory, p. 361; act passed March 4, 1802.

Rev. Code, 1823, ch. 38, p. 232.

MISSOURI.

Territorial Laws, vol. 1, p. 204.

Laws of 1838–9, p. 88; act approved Jan. 7, 1839.

NEBRASKA.

Rev. Stat. tit. xxvi., p. 538.

Gen. Stat. 1873, tit. xxvi., p. 651.

NEVADA.

Laws of Nev. Territory, 1861, p. 427, § 661.

NEW HAMPSHIRE.

Acts and Laws of the Province of N.H. 1771, pp. 45, 46. Ibid. p. 203.

Laws of N.H. 1797, p. 260; act passed Feb. 4, 1789.

Laws of N.H. 1805–10, p. 99; act passed June 26, 1810.

NEW JERSEY.

Laws of N.J. (Paterson's Rev. of 1800), p. 89; act passed Nov. 11, 1789.

Rev. Stat. ch. 101, § 1.

NEW YORK.

Laws of N.Y. 1691–1773, p. 413, § 13; act of 1762.
Laws of N.Y. 1792, vol. 1, p. 185.
Laws of N.Y. 1802, vol. 1, p. 542; act passed April 7, 1801.

NORTH CAROLINA.

Laws of the State of N.C. 1791, ch. xxxiv., p. 251; act of 1770.
Laws of N.C., Potter, 1821, ch. 96, p. 245; divers acts from 1784 to 1819.

OHIO.

Statutes of Ohio, 1824, vol. xxii., p. 228.

PENNSYLVANIA.

Laws of Penn., 1801, vol. 4, ch. 224, p. 480; act approved April 11, 1799. Same in Purdon's Abridgment, 1811, p. 419.

RHODE ISLAND.

Laws of R.I. (Rev. of 1798), p. 269; act of 1798.
Laws of R.I. (Rev. of 1822), p. 206.

SOUTH CAROLINA.

Pub. Laws of S.C. 1790, No. 788, p. 218; act of 1748.
Gen. Stat. §§ 1829, 1830.

TENNESSEE.

Laws of Tenn. 1821, vol. 1, p. 385; act of 1787, and divers acts down to 1817.

TEXAS.

Rev. Stat. 1879, art. 3465, p. 495.

VIRGINIA.

Laws of Va., collected in 1794, ch. 24, p. 34; act passed Nov. 28, 1786.

WISCONSIN.

Stat. of Wis. (Territory), 1838–9, p. 187.
Rev. Stat. 1878, ch. 134, § 3101.

If it is held that the mill acts of the states are in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States, how can it be contended that this long-continued legislation as to the division and sale of estates owned in common is valid? There is no ground upon which the latter can be sustained which will not uphold the former.

IV.

In *Lowell* v. *Boston*, 111 Mass. 454, 464, the Court said, —

"*It is doubtless within the power of the legislature to declare the existence of a public exigency for the establishment of a mill, for which the right of eminent domain may properly be exercised; as in the case of the Boston and Roxbury Mill Corporation and the Salem Mill Dam Corporation. What may be the limits of legislative power in that direction, and whether there are any limits, except in the sound discretion of the legislature, it is needless now to inquire.*"

And the Court then declares that the mill acts of Massachusetts rest on the power of the legislature to regulate the rights of riparian proprietors, as they do those of tenants in common.

It is clear that if the legislatures of the states have the power conceded to them in *Lowell* v. *Boston*, this Court cannot inquire whether, in this case, that power was properly exercised. The New Hampshire act of 1868 required the existence of a public exigency to be inquired into and found by a committee and then by the Court. Such public exigency was found to exist in this case.

In *Munn* v. *Illinois*, this Court say, "For our purposes we must assume that if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state" (94 U.S. 113, 132).

V.

In the states where they exist the mill acts have become a rule of property. Under them, and in reliance on them, immense vested interests have grown up. A decision of this Court that those acts were annulled by the adoption of the Fourteenth Amendment may render worthless improvements which have cost many millions of dollars, may deprive many thousands of people of employment, and may cause an immense depreciation in the value of real estate in communities where manufacturing is carried on by means of water power. Nor could such a decision fail to shake the numerous titles which rest on proceedings under the acts regulating the division of real estate owned in common.

The Fourteenth Amendment to the Constitution of the United States was not intended to have, nor has it, any such effect. Had it been supposed that it would annul the legislation of a century, and the judicial decisions upon which the manufacturing interests of a large majority of the states rest, it could never have been adopted in its present form. What its purpose was is a matter of history. That purpose was to protect the rights of an enfranchised race against the hostile legislation of the states.

Slaughter House Cases, 16 Wall. 36, 70.
Davidson v. *New Orleans*, 96 U.S. 97, 104.
Strauder v. *West Virginia*, 100 U.S. 303, 306.
Neal v. *Delaware*, 103 U.S 370, 386.

VI.

The plaintiff assigns for error the ruling of the State Court that the legislation of New Hampshire does not conflict with those provisions of the Fourteenth Amendment to the Constitution of the United States which prohibit any state from depriving any person of property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws.

What "due process of law" is is not exactly defined by the decisions of the courts. But the decisions of this tribunal seem to make it clear that the proceedings by which the defendant in

error obtained the right to raise its dam, constituted "due process of law" within the meaning of the Fourteenth Amendment.

In *Murray's Lessee* v. *Hoboken Land Improvement Co.*, 18 How. 272, 277, this Court said, "To what principles then are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold: We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

This Court in *Hurtado* v. *California*, 110 U.S. 516, 528, thus commented on the passage above quoted:

"The real syllabus of the passage quoted is that a process of law which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account as not due process of law. The answer was, however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless this in substance has been immemorially the actual law of the land, and therefore is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

In *Hagar* v. *Reclamation District*, 111 U.S. 701, it was held that in the assessment of property for taxation no notice to the owner nor opportunity for him to be heard was necessary. The Court said (p. 708), "The clause in question means, therefore,

that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

And in *Davidson* v. *New Orleans*, 96 U.S. 97, 105, this Court say, —

"It is not possible to hold that a party has without due process of law been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

See also *McMillan* v. *Anderson*, 95 U.S. 37.
Kennard v. *Louisiana*, 92 U.S. 480.
Walker v. *Sauvinet*, 92 U.S. 90.

Tested by the principles laid down in the cases which we have cited, can there be any doubt that the mill acts are "due process of law" within the meaning of the Fourteenth Amendment? The act of 1868 of New Hampshire was substantially identical, not only with the legislation of that state and province as far back as 1718, but also with the legislation of other colonies and states for a century and a half before the adoption of the Fourteenth Amendment. It was in accord with, and exactly analogous to, the legislation in England in regard to estates in common as far back as 1540, and the common law and legislation of all the colonies and states on that subject from their settlement to the present day.

It can, therefore, show "*the sanction of settled usage both in England and this country*," and by the rule laid down by this Court in *Hurtado* v. *California*, "*must be taken to be due process of law.*"

But not by the test of "*settled usage*" alone is the act of 1868 "*due process of law.*" It provides for ample notice to all parties interested, for a special finding by a committee, and then by the

Court, if required, that the erection of the dam is of public use or benefit, and a trial and an assessment of damages by a jury at the election of either party. Judged by the test laid down in *Hagar* v. *Reclamation District*, and other cases cited, that the process must be "*in observance of those general rules established in our system of jurisprudence for the security of private rights*," the act of 1868 is "*due process of law*."

The question here is not (as the counsel for the plaintiff seems to suppose) whether this Court think the flowage of his land under said act of 1868 a legitimate exercise of the right of eminent domain. Nay, it is not whether this Court (if the question were an original one) would hold that such flowage could be justified, either on the ground of eminent domain or on the other ground that it was a legitimate regulation of the riparian rights of the parties to this suit.

It is simply whether, considering the antiquity and universality of such and analogous legislation, the numerous decisions of the state courts sustaining it, its almost boundless public utility, the fact that it has become "a rule of property" whose overthrow will seriously cripple, if not destroy, the immense vested interests which rest upon it, and the further fact that its provisions are not only just, but indulgent even, to those whose lands may be flowed under it, this Court will decide that it has not enough of "*the sanction of settled usage*," nor enough of "*the observance of those general rules established in our system of jurisprudence for the security of private rights*," to make it "*due process of law*" in the states where it has existed so long, where the courts have sustained it, and where it has become such a rule of property.

VII.

Whether there is an actual *taking* of property by virtue of the act of 1868, is utterly immaterial, and we shall not discuss that question. In the lawful exercise of the right of eminent domain, the *taking* would of course be lawful. As a regulation of the rights of riparian owners, it is not so clearly a *taking* of property

as where the interest of one tenant in common in real estate is without his consent sold or transferred to his co-tenant by legal proceedings, as has been done at common law for centuries.

VIII.

In *Powers* v. *Bears*, 12 Wis. 221, quoted in the brief of plaintiff in error, the mill-dam law of Wisconsin was sustained solely "on the ground that the earlier decisions upon it had *made it a rule of property* which could not, with a due regard to individual interests, be departed from."

In every state where the validity of such acts has been upheld by the courts, or where they have been silently acquiesced in, they have become a rule of real property.

And having become such, this Court will not disturb them, but will consider them as authoritative.

Burgess v. *Seligman*, 107 U.S. 20, 33.
Bondurant v. *Watson*, 103 U.S. 278, 289.
Fairfield v. *County of Gallatin*, 100 U.S. 47.
Walker v. *Commissioners*, 17 Wall. 648.
Williams v. *Kirtland*, 13 Wall. 306.
Miles v. *Caldwell*, 2 Wall. 35.
Henderson v. *Griffin*, 5 Pet. 151.
Suydam v. *Williamson*, 24 How. 427.
Beauregard v. *City of New Orleans*, 18 How. 497.
Jackson v. *Chew*, 12 Wheat. 162.
Christy v. *Pidgeon*, 4 Wall. 196, 203.

And it was held in *Christy* v. *Pidgeon*, that this Court would construe a law differently, so as to conform to the different decisions in different states.

IX.

It is contended in the brief of the plaintiff in error that property cannot be taken in the exercise of the right of eminent domain in any case where the public could not be taxed to effect the same purpose. But in the decision in *Lowell* v. *Boston*, on which he

most relies, the Court say that in such a case as this the right of eminent domain can doubtless be exercised.

X.

It is not and cannot be contended that the said act of 1868 denies to the plaintiff in error the equal protection of the laws within the meaning of the Fourteenth Amendment.

GEO. F. HOAR,
B. WADLEIGH,
of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1884.

SAMUEL HEAD,
Plaintiff in Error,

vs.

THE AMOSKEAG MANUFACTURING COMPANY.

Additional Brief for Defendant in Error.

GEO. F. HOAR,
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Of Counsel.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

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SAMUEL HEAD, PLAINTIFF IN ERROR,

vs.

THE AMOSKEAG MANUFACTURING COMPANY.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

I.

The purpose of the 14th Amendment was to secure equality before the law, not to place under the protection of the United States all the natural rights previously defined and protected by the States.

Slaughter-House Cases, 16 Wal., 71.
Munn *vs.* Illinois, 94 U. S., 124.

In the debates, when the 14th Amendment was proposed, there is no suggestion of any intention to create any new constitutional limitation on State authority except so far as to secure equality.

Mr. Stevens, Cong. Globe, May 8th, 1866, p. 2459.
Mr. Raymond, *Ib.*, May 9th, 1866, p. 2502.
Mr. Garfield, cited by Field, J., in R. R. Tax Cases, 13 Fed. Rep., 739.
Mr. Farnsworth, Cong. Globe, May 10th, 1866, p. 2539.
Mr. Defrees, *Ib.*, Appendix, p. 226.
See concurring opinion of Mr. Justice Field, Butchers' Co. *vs.* Crescent City Co., 111 U. S. 758.

II.

The plaintiff makes no complaint of the process by which his land is taken, but only of the purpose of the taking.

He must maintain two propositions:

First. That no proceeding can be due process of law by which land is taken for any other than a public use.

Second. That the purpose for which his land is taken under the statute is not a public purpose.

We deny both these propositions. In regard to the first the settled usage is to the contrary.

Murray *vs.* Hoboken Co., 18 How., 72,
Stewart *vs.* Polk Co., 30 Iowa, 10–28.
Hurtado *vs.* California, 111 U. S., 516–537.
Kennard *vs.* Louisiana, 92 U. S., 480.

These acts existed in many of the States before the adoption of the 14th Amendment; in several, from very ancient times.

They have been declared unconstitutional in but four.

Tyler *vs.* Beecher, 44 Vt., 648.
Moore *vs.* Wright, 34 Ala., 311.
Loughbridge *vs.* Harris, 42 Ga., 500.
McClary *vs.* Hartwell, 25 Mich., 139.
Ryerson *vs.* Brown, 35 Mich., 333.

In but two of these, Alabama and Georgia, is the objection put on the ground that the process established by the statutes is not due process of law.

Mill acts, based on the principle under discussion, exist in twenty-four States, in which they have been directly sustained by judicial decision, or are in operation without question. In addition to the statutes and decisions already cited we cite the following:

In Pennsylvania since 1803:

Bioren's Laws of Penn., vol. 4, p. 20.
Brightly's Purdon's Digest (10th ed.), p. 1065.

In West Virginia:

2 Kelly's St. 1879, c. 91, §§ 29–36.

Hankins *vs.* Lawrence, 8 Blackf., 266.
Chapman *vs.* Groves, 8 Blackf., 308.
Wood *vs.* Wilson, 12 Ind., 657.
Wright *vs.* Pugh, 16 Ind., 106.
Burnham *vs.* Thompson, 35 Iowa, 421.
Stewart *vs.* Board of Supervisors, 30 Iowa, 10.
Hanson *vs.* Vernon, 27 Iowa, 28.
Lumley *vs.* Braddy, 8 Iowa, 33.
Dotson *vs.* Sibert, 4 Bibb, 464.
McDougle *vs.* Clark, 7 B. Mon., 448.
Bean *vs.* Hinman, 33 Me., 480.
Bryant *vs.* Glidden, 36 Me., 36.
Prescott *vs.* Curtis, 42 Me., 64.
Boston & Roxbury Mill Corporation *vs.* Newnan, 12 Pick., 467.
Hazen *vs.* Essex Co., 12 Cush., 537.
Miller *vs.* Troost, 14 Minn., 365.
Faribault *vs.* Hulett, 10 Minn., 15.
Turner *vs.* Holleran, 11 Minn., 253.
Hook *vs.* Smith, 6 Mo., 226.
Traver *vs.* Merrick Co., 14 Neb., 327.
Seeley *vs.* Bridges, 13 Neb., 549.
Nosser *vs.* Seeley, 10 Neb., 460.
Burgess *vs.* Clack, 13 Ired., 109.
Johnson *vs.* Roane, 3 Jones, Law, 523.
King *vs.* Shaford, 10 Ired., 100.
Howcott *vs.* Coffield, 7 Ired., 24.
Rhines *vs.* Clark, 51 Penn. St. R., 96.
Mowry *vs.* Sheldon, 2 R. I., 369.

Bull *vs.* Valley Falls Co., 8 R. I., 42.
Wilbor *vs.* Matteson, 8 R. I., 166.
Nichols *vs.* Aylor, 7 Leigh., 546.
Humes *vs.*. Shugart, 10 Leigh., 332.
Hunter *vs.* Matthews, 1 Rob., 468.
Hunter *vs.* Coalter, 4 Rand., 58.

The Legislature cannot arbitrarily transfer property from one private owner to another, whether with or without compensation. But there are many cases where the proper protection and regulation of private rights and public interest require such transfer, and to require and regulate it is a proper function of Government.

Marshall, Ch. J., 2 Pet., 251.

Instances of the due exercise of this power are—

The adjusting the relations of tenants in common.
Provisions for draining meadows and swamps.
For constructing sewers on private estates.
For compelling relatives to support each other in distress.

Upon this ground some eminent judges in Massachusetts have preferred to place the constitutionality of the Mill acts of that State.

Lowell *vs.* Boston, 111 Mass., 450 and cas. cit.
Murdock *vs.* Stickney, 8 Cush., 113.
Storm *vs.* Manchaug Co., 13 Allen, 10.
Bates *vs.* Weymouth Iron Co., 8 Cush., 548.
Fiske *vs.* Framingham Co., 12 Pick., 68.
Williams *vs.* Nelson, 23 Pick., 141.

III.

But we contend that this legislation is to be maintained as a proper exercise by legislative power of the right of

eminent domain in taking private property by proper process, with just compensation for public use.

We assume it to be settled—

First. The Legislature may delegate such authority to private persons or corporations, as in case of railroad or turnpike companies, who take land under general or special laws.

Second. The public service may be performed for private emolument.

Third. A use or benefit may be public in which only a small portion of the people in fact share, as, for instance, a college open only to persons who have certain prescribed attainments, or an asylum for the blind or the deaf and dumb, or a way used only by a neighborhood, or a drain accommodating a few estates only.

Fourth. The public benefit, the attainment of which by the use of property renders such use a public use, is in most, if not in all cases, but an aggregation of private benefits. The ferry accommodates such private persons only as have occasion to cross the stream on their private errands. The common school gives its separate education to each separate scholar. When the aggregate of these separate benefits becomes considerable the benefit becomes public.

We submit four propositions:

First. The restricted definitions of the term "public use," found in some familiar cases, are incorrect.

Senator Tracy in Bloodgood *vs.* M. & H. R. R. Co., 18 Wend., 56.

Jordan *vs.* Woodward, 40 Maine, 324.

Bigelow, Ch. J., in Talbot *vs.* Hudson, 16 Gray, 417.

Hagar *vs.* Reclamation District, 111 U. S., 701.

Second. The tests which determine whether a use be public

are the directness of the public benefit, the extent of the public benefit; and whether the governing motive in the legislation be to promote public and not private interests.

Where these elements exist, the distinction seems to us one wholly of degree.

Third. The inability to draw a precise line of demarcation is not fatal to our theory.

Fourth. The use for which the plaintiff's property is taken comes within the true definition of a public use.

B. & R. Milldam *vs.* Newman, 12 Pick., 477.
Company *vs.* Fernald, 47 N. H., 458.
Talbot *vs.* Hudson, 16 Gray, 417.

And all cases cited above in support of the constitutionality of the Mill acts.

GEO. F. HOAR,
B. WADLEIGH,
For Defendant.

75-113-5

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CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1884.

SAMUEL HEAD,
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ARGUMENT OF MR. GEO. F. HOAR,
FOR DEFENDANT IN ERROR.

JUDD & DETWEILER, PRINTERS.

ARGUMENT.

MAY IT PLEASE THE COURT:

It is needless to say that a case which comes to this jurisdiction from a State court, because of the question which it involves, is an important case; and that a case which requires the court to interpret and limit the constitutional security of the citizen, in life, liberty, or property, is of the very gravest importance. But even among these cases I think I am not mistaken in thinking that one in which a system is assailed which exists in twenty-four States, which has existed in many of them from the earliest times, on which depend large interests of property and business, which has been the creator of cities and of populous towns without number, which has given direction to the industries of States, to which is due largely the supremacy of this country among manufacturing nations, is of special and exceeding importance. This must be my apology for going over a field which has been so ably and faithfully covered by my associate to discuss questions some of which have been so recently considered by this court.

The original Constitution undertook to protect the rights of citizens only against legislation by Congress except in the two instances of *ex post facto* laws and bills of attainder, the prevention of discrimination by the States against the citizens of other States, and the securities necessary for the protection of commerce.

Mr. Justice GRAY: Have you not overlooked the provision as to impairing the obligation of contracts?

That I understand to be commercial, may it please your Honor.

The chief purpose of the first section of the 14th Amendment was to secure equality before the law. It did not design to place under the protection of the United States the natural rights which had previously been left to be defined and protected by the States.

"The one pervading purpose found in them all," (these three last amendments) "lying at the foundation of each, and without which none of them would have been even suggested, was the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."

Miller J., in Slaughter-House Cases, 16 Wall., 71.

It was not the purpose of this amendment to transfer the protection and security of all civil rights from the States to the Federal Government, or by the authority given to legislate to bring within the power of Congress the entire domain of civil rights heretofore belonging to the States.

Ib., p. 77.

Munn *v.* Illinois, 94 U. S., 124.

It was the design of the framers of the 14th Amendment, and of the State Legislatures who accepted it, to leave to the States to expound and enforce their own constitutions as before, except in this particular. The prohibition against being twice put in jeopardy for the same offence, against taking private property for public use without compensation, against cruel and unusual punishments, and many others were as important as that requiring due process of law. But these are still left to the States to be expounded and vindicated.

This is shown to have been the purpose of Congress by the debates when the 14th Amendment was proposed. There is no suggestion of any intention to create any new constitutional limitation on State authority, except so far as to secure equality.

Mr. Stevens, who reported the Amendment, in stating the object of the first section, says:

"This amendment allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all."

Cong. Globe, May 8th, 1866, p. 2459.

Mr. Raymond gives a history of the measure, Cong. Globe, May 9th, 1866, p. 2502, he says: "It first came in the form of an amendment, authorizing Congress to secure an absolute equality of civil rights." "Encountering objection in that form, it then came in the form of a bill, whereby Congress undertook to provide for enforcing against State tribunals the prohibition against unequal legislation." He then proceeds to declare himself in favor of the pending amendment, saying that he is "in favor of securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction."

See remarks of Mr. Garfield, cited by Field, J., in the Railroad Tax Cases, 13 Fed. Rep. 739.

Mr. Farnsworth, then a very able and influential member of the House, says, speaking of the whole section:

"It might as well, in my opinion, read 'No State shall deny to any person within its jurisdiction the equal protection of the laws.' But

a reaffirmation of a good principle will do no harm, and I shall not therefore oppose it on account of what I may regard as surplusage."
Cong. Globe, May 10th, 1866, p. 2539.

Mr. Defrees, Appendix, p. 226, says:

"Section one indisputably fixes the character of those who are entitled to be regarded as citizens of the United States, or citizens of the several States, and secures to all life, liberty, and property, and places all persons upon an equality, regardless of their condition or color, so far as equal protection of the law is concerned."

We do not desire to place very great stress upon these debates in Congress, but they confirm the statement of the history of this amendment made by Justice Miller in the opinion of the court in 16th Wallace.

Mr. Justice Field, in his concurring opinion in Butchers' Co. *vs.* Crescent City Co., 111 U. S., 758, says:

"The first section of the Fourteenth Amendment was, among other things, designed to prevent all discriminating legislation for the benefit of some to the disparagement of others."

When the Fourteenth Amendment was adopted, it could not have been intended to take from the States the power to expound their own constitutions. *If the method of taking be by a due and settled process of law, that process may, indeed must, be prescribed by the States.*

The plaintiff in error does not, so far as we are aware, make any complaint whatever of the process established by the New Hampshire statute. It contains every security which has been anywhere suggested as essential to due process of law.

What he complains of is not the process, but the purpose, for which, he alleges, his land is taken. To maintain his objection to the statute, he must maintain two propositions:

First. That no proceeding whatever can be due process of law by which property is taken for any other than a public purpose.

Second. That the purpose for which his land is taken under the statute is not a public purpose.

We deny both these propositions.

Upon the first of these questions we submit that if it be true as declared by Mr. Justice Curtis, in Murray *vs.* Hoboken Co., 18 How., 272, and Mr. Justice Matthews, in Hurtado *vs.* California, that in determining the question whether any particular form of procedure be due process of law, we may look to see "if it have the sanction of

settled usage in this country or England, and if it have, however exceptional it may be as tested by definitions and principles of ordinary procedure, it is due process of law." So in determining whether property may, under due form of process, including proper compensation, be ever taken for anything but a public purpose, we are to look to the same usage.

That usage has settled that it is within the province of the law-making power, where property in which several parties have an interest cannot be advantageously used or enjoyed by the exercise of their separate legal rights, to make provision for regulating such use and enjoyment, even if it be necessary to transfer, for suitable compensation and by suitable legal proceeding, the right, or a portion of the right, of one to the other.

We do not question that this is designed to be, and is, an effectual protection of many fundamental rights. It secures life, liberty, and property against every invasion that does not come within the definition of due legal process. That involves the essential requisite that it shall be under a rule operating equally on all citizens, which was the motive for its insertion in the 14th Amendment.

If it be not presumptuous to suggest an addition to Mr. Webster's well-known definition we would also say that "due process of law" implies a process *recorded*, capable of being revised by the highest judicial authority, as well as one which gives the party affected opportunity to be heard, and "which proceeds upon inquiry, and renders judgment only after trial," *and which secures adequate compensation for property taken.*

"Due process of law means ordinary judicial proceeding in court," &c.

Stewart *vs.* Polk County, 30 Iowa, 10–28.

Mr. Justice Mathews sums up his full and masterly discussion of this question in Hurtado *v.* California, 111 U. S., 516, 537, as follows:

"Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

See, also, Rennard *v.* Louisiana, 92 U. S., 480.

Mr. Justice Field put to my associate the question, Why the provision as to due process of law was inserted in the Fourteenth Amendment? It seems to me that the answer is, That the main purpose of

that amendment of securing equality to all classes and races before the law could not otherwise be effected. An arbitrary proceeding by a ministerial officer not surrounded by the sanctions which attend due process of law may respect persons or races or classes, and there can be no remedy, because the principle which governed him cannot be ascertained and proved and examined by this Court. The rule of action which governs a due and orderly legal proceeding can always be made to appear to the tribunal which is to revise it and its equality or inequality shown.

These acts existed in many of the States before the adoption of the Fourteenth Amendment, and in several from very ancient times. They have been declared unconstitutional in but four.

Tyler *vs.* Beecher, 44 Vt., 648.
Moore *vs.* Wright, 34 Ala., 311.
Loughbridge *vs.* Harris, 42 Georgia, 500.
McClary *vs.* Hartwell, 25 Mich., 139.
Ryerson *vs.* Brown, 35 Mich., 333.

The court in Vermont distinctly places its objection upon provisions of the constitution of that State which are not within national jurisdiction:

"The Legislature is limited in its powers by the constitution of the State, and whatever it does in excess of the limits is nugatory. The first article of the first part of the constitution declares acquiring, possessing, and protecting property to be among the natural, inherent, and inalienable rights of persons. The second article of the same part declares that private property ought to be subservient to public uses when necessity requires it, but that whenever taken for the use of the public the owner ought to receive an equivalent in money. These declarations, together, are equivalent to a declaration that private property ought, upon compensation made in money, to be subservient to public uses when necessity requires it, and to no other uses, even though necessity should require it, and compensation should be made."

Wheeler, J., in Tyler *vs.* Bender, *ub. sup.*

In Tennessee, Harding *vs.* Goodlett, 3 Yerger, 39, the power to take private property for private use is denied to the Legislature by implication from Art. 21 of the Bill of Rights of that State.

In Michigan the objection is based on Art. 188, § 2, of the constitution of that State.

McClary *vs.* Hartswell, *ub sup.*
Ryerson *vs.* Brown, *ub sup.*

In Beckman *vs.* Saratoga R. R., 3 Paige, 48, Walworth, Ch., puts

the invalidity of the Legislature to transfer property for private use, on the ground that it would be a violation of the implied contract by which the Government granted the land.

But see Cowen, J., *In re* John and Cherry Sts., 19 Wend., 676.

There are, therefore, but two decisions, that in Alabama and that in Georgia, which declare the process established by these statutes is not "due process of law." This is rather an intimation than an express affirmation in both cases, and no reasons are stated by the court.

Moore *vs.* Wright, 34 Ala., 311.
Loughbridge *vs.* Harris, 42 Georgia, 500.

Acts based upon the theory that the Legislature may lawfully authorize the flowing land, on due compensation to the owner, by the erection of dams for manufacturing purposes, were in existence in many States when the Fourteenth Amendment was adopted. Vast business interests were dependent upon them. It seems impossible, without disregarding the light which contemporary history throws upon the meaning of this provision, to hold that it was intended by the people to abrogate these statutes.

Harding *vs.* Funk, 8 Kansas, 315.
Venard *vs.* Cross, 8 Kansas, 248.
Olmstead *vs.* Camp, 33 Conn., 532.
Jordan *vs.* Woodward, 40 Maine, 317.
B. & R. Corporation *vs.* Newman, 12 Pick., 467.
Miller *vs.* Troost, 14 Minn., 365.
Company *vs.* Fernald, 47 N. H., 444.
Head *vs.* Amoskeag Co., 56 N. H., 386.
Moore *vs.* Wright, 34 Ala., 311.
Newcomb *vs.* Smith, 1 Chand., 71; 2 Pim., 131.
Fisher *vs.* Horicon, 10 Wisc., 351.

While we concede that the Legislature cannot arbitrarily transfer private property from one owner to another, whether with or without compensation, we by no means admit that there are not many cases where the proper protection and regulation of private rights may not require and justify such transfer. In such cases it is within the proper function of government to require and regulate it.

"Measures calculated to enhance the value of property are within the legislative power."

Marshall, Ch. J., 2 Pet., 251.

Upon this principle depend partition between tenants in common;

The provisions for remedying irregularities in such partition by requiring a payment of money by one tenant to another;

The giving the whole of common property, which cannot be divided without injury to one tenant, on his payment of the value of the share of his associate;

The provisions of law for draining meadows and swamps;

For building sewers for private estates.

Lowell *vs.* Boston and cas. cit.

Another instance of taking private property for a use not public is the compelling ancestors and descendants, when of sufficient ability, reciprocally to contribute to each other's support when in need.

Can it be doubted that it would be within the power of legislation to extend these provisions to brothers and sisters or their issue?

Upon this ground some eminent judges in Massachusetts have preferred to place the constitutionality of the mill acts of that State.

Lowell *vs.* Boston, 111 Mass., 450, and cases cited.
Murdock *vs.* Stickney, 8 Cush., 113.
Storm *vs.* Manchaug Co., 13 Allen, 10.
Bates *vs.* Weymouth Iron Co., 8 Cush., 548.
Fiske *vs.* Framingham Co., 12 Pick., 68.
Williams *vs.* Nelson, 23 Pick., 141.

But we claim that this legislation is to be maintained, not by any limitation upon the constitutional power of this court to examine it, not merely by relying upon a public usage which may have grown up inconsiderately, not certainly by any doubtful refinements, but upon its merits, as a proper exercise by legislative power of the right of eminent domain in taking private property by proper process, and with just compensation, for public use.

We may assume some things as settled:

First. The Legislature may delegate such authority to private persons or corporations, as in case of railroad or turnpike companies who take land under general or special laws.

Second. The public service may be performed for private emolument.

Third. A use or benefit may be public in which only a small portion of the people in fact share, as, for instance, a college open only to persons who have certain prescribed attainments, or an asylum

for the blind or the deaf and dumb, or a way used only by a neighborhood, or a drain accommodating a few estates only.

Fourth. The public benefit, the attainment of which by the use of property renders such use a public use, is in most, if not in all cases, but an aggregation of private benefits. The ferry accommodates such private persons only as have occasion to cross the stream on their private errands. The common school gives its separate education to each separate scholar. When the aggregate of these separate benefits becomes considerable enough the benefit becomes public.

In determining whether the definition of the term "public use" as used in the Constitution shall be so restricted as to forbid the legislation now under discussion, the court is to choose between the opinions of jurists of high authority. It will hardly be denied that the preponderance of such authority is on our side; although we concede that there are some highly respectable opinions on the other.

We submit four propositions:

First. The restricted definitions of the term "public use" found in some familiar cases are incorrect.

Second. Three elements enter into the true definition, all depending largely on the question of degree. The distinction rests in each case upon the extent and magnitude of the public interest as compared with the private, upon the directness of the public interest as compared with the private, and upon whether the public interest and not the private is the governing motive in passing the law.

Third. It is no fatal objection to our theory that an exact line cannot be drawn which shall distinguish all uses which are public from all which are merely private.

Fourth. The use for which the plaintiff's property is taken comes within the true definition of a public use.

First. The restricted definitions of the term "public use" found in some well-known cases are incorrect. This will appear from a consideration of familiar examples of uses that are unquestionably public.

Senator Tracy in Bloodgood *vs.* M. & H. R. R. Co., 18 Wend., 56, declares "the term is to be confined to its simple sense of direct possession, occupation, and enjoyment by the public."

Rice, J., in Jordan *vs.* Woodward, 40 Maine, 324, says: "Strictly

speaking, private property can only be said to have been taken for public uses when it has been so appropriated that the public have certain and well defined rights to its use secured."

On the other hand, Bigelow, Ch. J., in Talbot *vs.* Hudson, in 16 Gray, 417, says: "It has never been deemed ~~expedient~~ essential that the entire community, or any considerable portion of it, should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use within the true meaning of these words as used in the Constitution. Such an interpretation would greatly narrow and cripple the authority of the Legislature so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the State. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the declaration of rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State, or which tends to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community."

Ch. Justice Bigelow further states that "there are intermediate cases where public and private interests are blended together, in which it becomes more difficult to decide within which of the two cases they may be properly said to fall. There is no fixed rule or standard by which such cases can be tried and determined. Each must necessarily depend upon its own peculiar circumstances."

We submit that Chief Justice Bigelow's theory is the correct one. Numerous instances may be put of public uses when the direct advantage enures to few persons only, *e. g.*, technical schools, drawing schools, colleges, private ways. Instances, also, may be put of expenditures clearly public and within the legislative power where the community have no rights saved or reserved at all. Can it be doubted that it would have been competent for the Legislature to offer a reward in advance for the discovery of ether, or of the steam engine? In a strict analysis, all public uses, except where the corporate authority of the nation or State or municipality occupies property itself, are but an aggregation of private uses. If you may take my land for a road, that any man may pass over it at his pleasure to or from his private estate on his private errand, because public prosperity is thereby enhanced, why may you not take it that any man, who has a waterfall which he could not otherwise use,

may develop and use it, the public prosperity being thereby enhanced in a vastly larger degree?

The opinion of the court in Hagar *vs.* Reclamation District (111 U. S., 701), seems to involve the whole principle.

The court uses the words "health and prosperity," but unless the the word "prosperity" be mere surplusage, "health or prosperity" would equally express its meaning, as the whole course of reasoning shows.

It is contrary to the notorious fact to put the cases of draining of swamps or of ordinary private drains upon the ground of public health. (If you did it would not bring them within plaintiff's claim that the public must have a right to *use* them.) These swamps may be drained ~~although they~~ although used solely for agricultural purposes, and at a distance from human habitation. There is no adjudication that the public health is affected. Private drains may be built from factories or shops or farms, or land not built on, as well as from dwellings. If it be a public use to drain the land in order that it may be more profitably and conveniently occupied for a factory, is it not equally a public use to supply a motive power, without which it could not practically be occupied for a factory at all?

It is also contrary to the notorious fact to put the case of private ways on the ground that the public have a right to use them. Perhaps they have, but they don't use them; they are not expected to use them; they are not laid out that the public may use them. There is no adjudication that the public convenience and necessity requires them. It is because of the public advantage that private property shall be reached and improved and developed that these ways are supported.

Second. The tests which determine whether a use be public are—

The directness with which the public is benefited;

The extent of the public benefit; and whether the governing motive in the legislation be to promote public or private interests.

When these three things exist the distinction seems to us one wholly of degree. This may be illustrated by the case of provisions for the public health, or the law of public nuisance.

The difference between the cholera or the plague, the suppression of which warrants public remedies, and an epidemic cold, or sore throat, is one of degree only; so the difference between the smell of a hotel kitchen and that of a varnish factory; a baby's drum and the noise of an establishment for making boilers.

Communis rixatrix, a common scold, is a public nuisance, which differs in degree only from an infirm temper.

Third. The inability to draw a precise line of demarcation is not fatal to our theory.

We do not claim that it is competent for the Legislature arbitrarily to transfer the property of one person to another, even for due compensation.

On the other hand, we deny that the term public use is (in the language of Senator Tracy, Bloodgood *vs.* M. & H. R. R. Co., 18 Wendell, 56) "to be confined to its simple sense of direct possession, occupation, and enjoyment by the public."

It is to be observed that when you analyze the very clear and powerful statement of Senator Tracy, which puts the argument against this legislation in its very greatest strength, he rests solely upon the inability to draw a clear and precise line which shall distinguish in principle all cases of taking private property from one citizen and transferring it to another for private advantage from all cases of doing the same thing for public advantage. But we submit that the want of exactness and precision in the separating line does not show that the two classes are not practically and generally distinguishable. The distinction rests in each case upon the extent and magnitude of the public interest as compared with the private, upon the directness of the public interest as compared with the private, upon whether the public interest and not the private is the governing motive in passing the law. Where a legal distinction is one wholly of degree, you never can express it exactly with mathematical precision, in words. We do not deny that the question of the meaning of the term "public use" is a judicial and not a legislative question. But the fact that in a large majority of the American States, and from the earliest times, legislative bodies have passed these laws, governed solely by considerations of public advantage, and without a thought of benefiting any private person whatever, should have very great weight in its determination.

The historian who records the wonderful material progress of this country will declare that many of its most prosperous communities owe their wealth, population, and prosperity largely to this system of legislation.

Fourth. The use for which the plaintiff's property is taken comes within the true definition of a public use.

The question is, whether the development of the water-power of a State, the direct result of which is the creation of cities like Lowell, Lawrence, Holyoke, Manchester, Nashua, and of countless villages and towns ranging from a few hundreds to ten or fifteen thousand in population, is a public purpose.

It is not the mere transfer from one owner to another of his estate on the ground that the latter will use it better and the public thereby be incidentially benefited. It is the creation of a powerful agent—practically in very many localities, the only method by which it can be created, which in its turn creates an immediate, direct and vast public benefit. Could not a State legislature have lawfully offered in advance a reward for the invention of the steam engine, or the telegraphic alphabet, or the discovery of ether; and would not this have been clearly an expenditure of public money for a public use, even if these instruments were never used except by private persons for private uses?

In the New England States, and in many communities elsewhere, the great public benefits of wealth, employment, vast increase of population, attraction of emigration from other countries, have been the direct, certain, inevitable results of this legislation. These benefits are attributable to it in larger degree than to any other cause, except the introduction of railroads. Legislatures in passing these laws have thought only of public and not of private use or advantage. The man whose land is flowed is paid amply for all he loses, and the man who flows it pays always abundantly for all he gets. It seems to us that this use of land would serve to the common sense and apprehension of ordinary men for an illustration or example of a public use, and that it is only when we begin to refine or enter the region of metaphysics that we begin to doubt it.

Suppose a new State owned all the streams, with the right to flow adjacent lands, as it does the great ponds, and should give all its mill-sites to citizens on the sole condition of erecting mills, would it be doubted that this was a disposal of the public property for a public use?

Putnam, J., in B. & R. Mill Dam Corp. *v.* Newman, 12 Pick., 477, "is at a loss to imagine any undertaking in which the public had a more certain and direct interest and benefit."

See whole opinion.

"If we are to follow the example of other governments and the decisions in other jurisdictions, it would seem to be clear that to create and improve water-power in the streams and waters of a country is a matter of such general public advantage that private property taken for that purpose is taken for a public use within the legal meaning of that term; that, in the language of our Constitution, the exercise of the power to grant the right of taking private property for that purpose in a proper case would, in the language of the Constitution, be for 'the welfare and benefit of the State.'"

Perley, Ch. J., in Company *vs.* Fernald, 47 N. H., 458.

Suppose the land in one of our mining States were held in narrow strips, as in some districts in France, and mines should be discovered under the surface, could not the legislature provide by a system similar to this for the working of the mines?

Take the matter of irrigation, the great public need in vast spaces of our domain. Is it not competent for the legislative power to provide for the taking of lands for compensation, and under suitable regulations by private persons, in order that an efficient system of irrigation may be established, which is merely one mode of developing the productive capacity of land, as this is another mode? It would certainly be a great public calamity if this court were to feel itself bound to declare all such legislation by the States which are to come into being in the great alkali region of the continent a violation of the Constitution of the United States.

There has been no conflict in the decisions of the court in Massachusetts. There has been a variety of opinions among the judges who have given the opinions of that court as to the reasons by which her mill acts are to be supported. Bigelow and the earlier judges put their judgments on the ground that the use is public. Shaw, Ch. J., supports them on both grounds—public use and reasonable regulation of rights held in common. Wells, J., in Lowell *vs.* Boston, puts them on the last ground solely.

It is said that it is no more justifiable to take property for mills, on the ground that their business is beneficial to the public, than to take it for groceries or for farms. But if the capacity to have groceries or the capacity to have farms in many communities were dependent upon the exercise of the power, that would be true. These laws were not enacted that A or B might have a factory or a mill. It was, originally, that factories or mills might exist.

I wish, in conclusion, to call to the attention of the Court one weighty sentence of Ch. J. Marshall, in McCulloch *vs.* Maryland:

"A doubtful question, one on which human reason may pause and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, if not put at rest by the practice of the Government, ought to receive a considerable impression from that practice. An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."